DOCKET

EDITOR'S NOTE

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PROCEEDINGS AND ORDERS

DATE: 031087

CASE NBR 86-1-05307 CSY
SHORT TITLE Williams, Lewis
VERSUS Ohio

CASE STATUS: DECIDED
DOCKETED: Aug 12 1986

*** CAPITAL CASE -- Stay granted by lower court ***

Entry	Date	Note	Proceedings and Orders
1	Jul 1 1986		Application for extension of time to file petition and order granting same until August 12, 1986 (O'Connor, July 7, 1986).
2	Aug 12 1986	P	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Sep 15 1986		Brief of respondent Ohio in opposition filed.
5	Sep 18 1986		DISTRIBUTED. October 10, 1986
6	Feb 6 1987		REDISTRIBUTED. February 20, 1987
10	Feb 23 1987		REDISTRIBUTED. February 27, 1987
12	Mar 2 1987		REDISTRIBUTED. March 6, 1987
14	Mar 9 1987		Dissenting opinion by Justice White with whom Justice Brennan joins. Dissenting opinion by Justice Marshall. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

EDITOR'S NOTE

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86-5307(2)

ORIGINAL

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

LEWIS WILLIAMS,

Petitioner,

-vs-

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

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34 pp

QUESTIONS PRESENTED

I. WHETHER THE OHIO STATUTORY DEATH PENALTY SCHEME, WHICH PERMITS THE JURY TO CONSIDER AS AN AGGRAVATING CIRCUMSTANCE THAT THE OFFENDER COMMITTED AN AGGRAVATED MURDER WHILE COMMITTING THE CRIME OF AGGRAVATED ROBBERY FAILS IN ITS REQUIRED DUTY TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, BECAUSE IT ALLOWS THE JURY TO CONSIDER AN ELEMENT OF THE UNDERLYING CRIME AS AN AGGRAVATING CIRCUMSTANCE?

II. WHETHER A JURY INSTRUCTION VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN IT ORDERS THE JURY NOT TO BE INFLUENCED BY ANY CONSIDERATION OF SYMPATHY AND IMPROPERLY FORCES THE JURY TO DISREGARD THE VERY ESSENCE OF MITIGATION WHILE MAKING ITS SENTENCING DETERMINATION IN A CAPITAL CASE?

III. WHETHER THE PROSECUTION'S REPEATED COMMENTS AND THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT ITS DEATH VERDICT WAS ONLY A NON-BINDING RECOMMENDATION AND THAT THE TRIAL COURT WOULD MAKE THE ULTIMATE DECISION TO IMPOSE THE DEATH PENALTY DIMINISHED THE JURY'S RESPONSIBILITY TO IMPOSE AN INDIVIDUALIZED DEATH SENTENCE IN THIS CAPITAL CASE DEPRIVED PETITIONER OF HIS RIGHT TO LIFE WITHOUT DUE PROCESS?

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The reported opinion of the Ohio Supreme Court, affirming the judgment and conviction and sentence of death, is reported at 23 Ohio St. 3d 16 (1986) and is reproduced in the appendix beginning at page A-3. The unreported opinion of the Ohio Court of Appeals - Eighth Appellate District is reproduced in the appendix beginning at page A-13. The Cuyahoga County Court of Common Pleas (trial court) issued a sentencing opinion which is reproduced in the appendix beginning at page A-50.

Petitioner has also relied upon the following Ohio Supreme Court cases, State v. Jenkins, 15 Ohio St. 3d 164 (1984), which is reproduced in the appendix at page A-55; State v. Johnson, 24 Ohio St. 3d 87 (1986), which is reproduced at page A-93.

JURISDICTION

Petitioner respectfully requests this Court to invoke jurisdiction pursuant to 28 U.S.C. §1257(3). On October 7, 1983 a jury in Cuyahoga County, Ohio found Petitioner guilty of Aggravated Murder (causing the death of another while committing an aggravated robbery) with a specification that the Petitioner committed an aggravated murder while committing an aggravated robbery. On October 16, 1983 the same jury recommended that the death sentence be imposed on Petitioner. The trial court sentenced Petitioner to death on November 3, 1983.

The Court of Appeals for the Eighth Appellate District of Ohio affirmed both Petitioner's conviction and sentence on October 25, 1984.

The Ohio Supreme Court affirmed both Petitioner's conviction and sentence on March 26, 1986. Petitioner filed a timely Motion for Rehearing on April 4, 1986, which the Ohio Supreme Court denied on May 14, 1986.

On July 7, 1986 Justice O'Connor extended until August 12, 1986 the time in which to file a Petition for Writ of Certiorari.

Petitioner prays this Court to grant the Writ of Certiorari in this case involving important questions about the federal constitution and the application of the Ohio death penalty statutes for the reason that the state courts of Ohio in this matter are in conflict with this Court and with the Eighth District Court of Appeals as well as the supreme courts of several sister states, and for the reason that this Court has issued a writ of certiorari on the same issue presented in Question II of this Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

The full text of Amendments are reproduced in the Appendix at 106.

Ohio Revised Code

The full text of the statutes are reproduced in the Appendix at 107.

STATEMENT OF THE CASE

Petitioner was indicted, tried, and convicted of aggravated murder

> purposely caus[ing] the death of another, to wit: Leona Chmielewski, while committing or attempting to commit or fleeing immediately after or attempting to commit Aggravated Robbery.

Under the Ohio Revised Code §2929.02 et seq., the death penalty is precluded, unless at least one of eight aggravating circumstances are pleaded in the indictment and proven at trial. Of the eight aggravating circumstances, Petitioner's indictment specified only one:

> that the offense presented above was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Robbery and either the offender was the principle offender in the commission of the Aggravated Murder, or, if not the principle offender, committed the Aggravated Murder with prior calculation and design.

Petitioner in briefs before both the Ohio Supreme Court and Ohio Court of Appeals, argued that this aggravating circumstance merely repeated an element of the crime with which he had been charged and violated the Eighth and Fourteenth Amendments to the United States Constitution, because it failed to narrow that class of felony murderers who should be put to death. The Ohio Supreme Court rejected the argument and held, "any duplication is the result of the General Assembly having set forth in detail when a murder in the course of a felony rises to the level of a capital offense, thus, in effect, narrowing the class of homicides in Ohio for which the death penalty becomes available as a sentencing option." Williams, 73 Ohio St. 3d 16, 23 (1986), citing State v. Jenkins, 15 Ohio St. 3d 164, 178 (1984), cert. denied 473 U.S. ___ (1985).

In the mitigation phase of Petitioner's trial, the trial court defined mitigating factors as factors that:

> do not justify or excuse the crime, nevertheless in fairness and mercy, may be considered by you as extenuating or reducing the degree of the defendant's blame or punishment.

(Emphasis added). However, during the same instructions the trial court instructed the jury:

> You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence to decide all disputed questions of fact, to apply the instructions of the Court to your findings, and to render your verdict accordingly.
>
> In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your findings with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

(Emphasis added).

Petitioner argued to the Supreme Court of Ohio that these instructions created an ambiguity and removed from the jury's consideration all factors of sympathy, which is the essence of mitigation. The Ohio Supreme Court noted that Petitioner may not have taken all the steps necessary in order to preserve the issue for review, Williams, 23 Ohio St. 3d at 22. However, the Ohio Supreme Court did not rely on state procedural grounds or rule that Petitioner had waived the issue, rather it rejected Petitioner's argument on its merits by holding "we specifically rejected this argument in State v. Jenkins," Williams, 23 Ohio St. 3d at 22.[1] This issue is properly before this Court, Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633, 2638 (1985).

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[1] In State v. Jenkins, 15 Ohio St. 3d 164 (1984) the Ohio Supreme Court addressed the "no mercy" instruction, cited this Court's decision in Barclay v. Florida, 463 U.S. 939 (1983) and Zant v. Stephens, 462 U.S. 862 (1983) and held that the "no sympathy" instruction was "intended to insure that the sentencing decision is based upon a consideration of the reviewable guidelines fixed by statute as opposed to the individual juror's personal biases or sympathies," Jenkins, 15 Ohio St. 3d at 192.

Under the Ohio statutory death penalty structure a jury verdict for death is a recommendation; but a recommendation that carries great weight. The trial court cannot impose death if the jury does not recommend it. If the jury does return a death verdict, the trial court can still impose a life sentence, if it feels the aggravating circumstances do not outweigh the mitigating factors. On the other hand, a jury verdict for life is mandatory. The trial court may not override the jury verdict and impose death.

Throughout Petitioner's trial the jury was told their death verdict was nothing more than a recommendation, and that the trial judge would make the ultimate decision as to a death sentence. Petitioner argued that it was improper to relieve the jury of its responsibility in fixing the penalty. The Ohio Court of Appeals rejected the argument. Petitioner renewed his argument before the Ohio Supreme Court. During the time between the Ohio Court of Appeals' decision and the Ohio Supreme Court's decision this Court announced its decision in Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633 (1985). Petitioner placed the Caldwell issue before the Ohio Supreme Court in his Reply Brief.

The Ohio Supreme Court analyzed the Caldwell issue and affirmed Petitioner's conviction and sentence. The Ohio Supreme Court ignored the clear mandate of Caldwell, that such instructions and comments diminish the jury's sense of responsibility and render any death verdict suspect. Rather the Ohio Supreme Court misapplied Justice O'Connor's lone concurring opinion that such instructions are valid, as long as they are accurate. The Ohio Supreme Court ruled that the instruction in Petitioner's trial stated the law accurately and affirmed the conviction, Williams, 23 Ohio St. 3d at 21-22. However, the Ohio Supreme Court

repeated earlier admonishment that such instructions have the potential to lessen the jury's responsibility and ordered that they not be given in the future, Williams, 23 Ohio St. 3d at 22.

ARGUMENT

I.

THE OHIO STATUTORY DEATH PENALTY SCHEME, WHICH PERMITS THE JURY TO CONSIDER AS AN AGGRAVATING CIRCUMSTANCE THAT THE OFFENDER COMMITTED AN AGGRAVATED MURDER WHILE COMMITTING TH CRIME OF AGGRAVATED ROBBERY, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, BECAUS IT ALLOWS THE JURY TO CONSIDER AN ELEMENT OF THE UNDERLYING CRIME AS AN AGGRAVATING CIRCUMSTANCE, AND THEREBY FAILS IN ITS REQUIRED DUTY TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

This Court has held that the death penalty violates th constitutional provisions against cruel and unusual punishment, unless it can be shown that said penalty is not being imposed wantonly, arbitrarily or capriciously, Furman v. Georgia, 408 U.S. 238 (1972). In response, Ohio adopted a death penalty structure wherein an offender must be convicted of both aggravated murder and at least one statutory aggravating circumstance, before he can be sentenced to death. The purpose of such aggravating circumstances is to, "circumscribe the class of persons eligible for the death penalty," Zant v. Stephens, 426 U.S. 862, 878 (1983). When an aggravating circumstance fails to narrow th class of persons eligible for death, it fails to perform its required function of insuring that death is not being imposed wantonly or capriciously. A death sentence supported by an aggravating circumstance with such a defect cannot withstand the constitutional challenge that it is cruel and unusual punishment. Godfrey v. Georgia, 446 U.S. 420, 428-429 (1980).

Ohio Revised Code §2903.01 defines aggravated murder a purposely causing the death of another either:

> with prior calculation or design

or

> while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

Petitioner was indicted under the second prong, more commonly referred to as "Felony Murder." Petitioner's indictment (attached in the appendix) states Petitioner purposely:

> caused the death of another, to-wit: Leona Chmielewski, while committing or attempting to commit or while fleeing immediately after committing or attempting to commit Aggravated Robbery.

Of the eight possible statutory aggravating circumstances, Petitioner was charged with only one:

> that the offense [of Aggravated [felony] Murder was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Robbery and either the offender was the principal offender in the commission of the Aggravated Murder, or, if not the principal offender, committed the Aggravated Murder with prior calculation and design.

Petitioner challenged the validity of the lone aggravating factor lodged against him. He argued that the aggravatin factor did nothing more than duplicate an element of the crime, that he caused the death of another, while committing aggravated robbery. Such an aggravating circumstance fails in its essentia duty to narrow and limit that class of persons for whom the deat penalty should be a sentencing alternative. Of the eight statutory aggravating factors all except one, the one with which Petitioner was indicted, add additional elements or factors to the crime. An aggravated murder is elevated into a capital murder, because of this additional, aggravating factor. The "Felor Murder" aggravating factor, on the other hand, adds nothing. Under the Ohio scheme, a felony murder bootstraps itself into a capital murder by the simple act of re-alleging that the murder was committed while committing one of the listed felonies. No extra analysis of additional factors is required.

Petitioner also argued that the felony murder aggravating factor is illogical. A man who with premeditation commit the most heinous axe-murder on an elderly victim would not, without an additional factor, be eligible for the death penalty. However, a man who did not plan to kill anyone but who did kill during the course of another felony would be eligible for the death penalty without any additional factors. No reason support such disparate treatment.

In rejecting Petitioner's argument the Ohio Supreme Court relied exclusively on its earlier decision in State v. Jenkins, 15 Ohio St. 3d 164 (1984), Williams, 23 Ohio St. 3d at 23. In Jenkins the Ohio Supreme Court cited language from Jurek v. Texas, 428 U.S. 262, 271 (1976), where this Court wrote:

> So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas [which statutorily limited the death penalty to one of five classifications of murder] and the other two States is that the death penalty is an available sentencing option--even potentially--for a smaller class of murderers in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime.

The Ohio Supreme Court applied Jurek and concluded:

> any duplication is the result of the General Assembly having set fourth in detail when a murder in the course of a felony rises to the level of a capital offense, thus, in effect, narrowing the class of homicides in Ohio for which the death penalty becomes available as a sentencing option.

Jenkins, 15 Ohio St. 3d at 178.

The Jenkins Court indicated that the Ohio "Felony Murder" aggravating factor did sufficiently narrow the field, because it limited the death penalty to those who were the principal offenders of the felony murder and/or those aiders and abettors who acted with prior calculation and design; and because it limited the death penalty only to murders committed during the

commission of certain listed felonies, not all felonies, Jenkins 15 Ohio St. 3d at 177 n. 17. Neither justification cited by the Ohio Supreme Court actually serves to limit the class of felony murders who can receive the death penalty or to save the factor from its unconstitutional application on Petitioner.

In Enmund v. Florida, 458 U.S. 784 (1982) this Court ruled that the death penalty cannot be imposed against an offend who aided and abetted in a felony during which someone is killed but who did not himself kill, unless the offender intended that the killing take place. The language of the Ohio statute, that the offender must be either the principal in the killing or have acted with prior calculation and design, was written while Enmund's petition for writ of certiorari was pending before this Court. It is nothing more than a legislative codification of th Enmund rule. It does not limit the class of persons eligible fo death in any way, as persons who fall outside of the Enmund rule are not eligible for death. The only effect that "the principal offender" or "acted with prior calculation and design" language has, in light of the Enmund rule, is that it codified what state body is responsible for making the Enmund determination in anticipation of Cabana v. Bullock, ___ U.S. ___, 106 S.Ct. 689 (1986

The fact that a murder committed during the commission of another felony can qualify for the death penalty only during the commission of a limited number of felonies also fails to narrow the class of persons eligible for the death penalty. Under the Ohio statutory scheme as it exists, anyone who commits a murder while committing aggravated robbery is automatically eligible for the death penalty. Once the jury finds the offende guilty of the underlying crime in the guilt phase, there is

little, if any, possibility that it will find the offender not guilty of an aggravating factor, which simply repeats elements of the crime of which it has just convicted the offender. Thus, th felony murderer enters the sentencing phase with a built-in aggravating factor, without any particularized evaluation as to wh this offender is deserving of death. There is no individualized deliberation as to why felony murderer A deserves death while felony murderer B does not.

Because the felony murderer enters the sentencing phas with built-in aggravating factors, the Eighth Circuit found aggravating factors which merely repeat elements of the underlying crime to be repugnant to the Constitution, Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), cert. denied ___ U.S. ___, 106 S.Ct. 4546 (1985). The State of Arkansas had an aggravating factor of murder for pecuniary gain. The Arkansas courts interpreted that factor to include murders committed while committing the crime of robbery, Collins, 754 F.2d at 261-262.

In Collins the Eighth Circuit analyzed the elements of the first degree murder while committing a robbery and the aggravating circumstance of murder for pecuniary gain, and determined that they duplicated each other. No such analysis is required i the Ohio scheme. This Court need only look at the indictment attached in the Appendix to see that the language of the body of the indictment that Petitioner caused the death of Leona Chmielewski,

> while committing or attempting to commit or while fleeing immediately after committing or attempting to commit Aggravated Robbery

is a word-for-word duplicate of the language in the specificati

> the offense presented above was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Robbery.

In the face of identical language, there can be no doubt that th sole aggravating factor with which Petitioner was charged duplicates an element of the underlying crime with which he had been charged and adds nothing new for the jury to consider. The question is: does such duplication violate the Eighth and Fourteenth Amendments?

Collins found that the function of aggravating factors was to reduce the danger that the death penalty would be imposed wantonly or arbitrarily. They function properly when they are objective criteria, "that can be used to distinguish a particula defendant on whom the jury has d ided to impose the death sentence from other defendants who ve committed the same underlying capital crime." Collins, 754 F.2d at 264. The Collins court went on to hold:

> We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function. Every robber-murderer has acted for pecuniary gain. A jury which has found robbery-murder cannot rationally avoid also finding pecuniary gain. [Just as a jury which has found murder while committing Aggravated Robbery cannot avoid finding a specification that the offender committed murder while committing Aggravated Robbery.] Therefore, the pecuniary-gain [or Ohio's aggravated robbery] aggravating circumstance cannot be a factor that distinguishes some robber-murderers from others. In effect, a robber-murderer enters the sentencing phase with a built-in aggravating circumstance. Since under Arkansas [and Ohio] law and the Eighth Amendment as elaborated by the Supreme Court in Godfrey v. Georgia, supra, only one aggravating circumstance is required to impose the death penalty, the State has no need to show any additional aggravating circumstances at the sentencing phase. Thus, if no other aggravating circumstances are found [no other aggravating circumstances were found in Petitioner's trial, as he was charged with only one aggravating factor and the Ohio Supreme Court forbids consideration of any aggravaring factor which was not charged in the indictment, Jenkins, 15 Ohio St. 3d at 207 and State v. Johnson, 24 Ohio St. 3d 87, 93 (1986)], the jury is left to decide whether to impose death on a robber-murderer without having made any finding which narrows the class of persons who have committed this death-eligible crime.

Collins, 754 F.2d at 264 (emphasis added). Once the offender ha been found guilty of the underlying crime, he cannot be sentence to death, unless the jury additionally finds some aggravating factor, which makes his crime more heinous and worthy of death. When the aggravating factor does nothing more than duplicate the crime, this additional safeguard is completely avoided, Collins, 754 F.2d at 265.

For all of the above reasons, the Eighth Circuit held in Collins that an aggravating circumstance which merely duplicates an element of the crime cannot sufficiently narrow the class of persons eligible for death under Stephens and Godfrey.

Other jurisdictions have also concluded that an aggravating circumstance which duplicates an element of the crime is constitutionally infirm. See e.g. State v. Silhan, 275 S.E. 2d 450, 474-478 (N.C. 1981), Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), and Colley v. State, 405 So. 2d 374 (Ala. 1979).

REASONS FOR ISSUING THE WRIT

The Supreme Court of Ohio is in direct conflict with the Eighth Circuit in Collins as well as the supreme courts of North Carolina, Florida, and Alabama. The question involved is one of great national and constitutional importance, as a large number of the states have a felony murder or murder for pecuniar

gain aggravating factors. Moreover, the conflict that exists between Ohio and the other cited state jurisdictions and the Eighth Circuit shows that the issue is far from settled or clear. This Court should grant Petitioner's writ for certiorari, so that it can definitively answer the question: may a state constitutionally imposed death upon an offender, when an aggravating factor upon which the jury relied in voting for the death penalty, fails to narrow the class of persons eligible for death, because the aggravating circumstances does nothing more than duplicate an element of the underlying crime.

II.

A JURY INSTRUCTION VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN IT ORDERS THE JURY NOT TO BE INFLUENCED BY ANY CONSIDERATION OF SYMPATHY AND IMPROPERLY FORCES THE JURY TO DISREGARD THE VERY ESSENCE OF MITIGATION WHILE MAKING ITS SENTENCING DETERMINATION IN A CAPITAL CASE.

The Constitution commands that the sentencing authority in all capital cases must consider any and all mitigating factors, Lockett v. Ohio, 438 U.S. 586, 604 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 113-115 (1982). In Woodson v. North Carolina, 428 U.S. 280, 304 (1976) this Court equated "mitigating" factors and "compassionate" factors. This line of cases "make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any 'sympathy factor' raised by the evidence before it," People v. Easley, 34 Cal. 3d 858, 876 (1983).

The essence of mitigation is sympathy. The trial court in Petitioner's case recognized this simple fact, for it defined mitigating factors in its jury instructions as:

> factors that while they do not justify or excuse the crime, nevertheless in fairness and mercy, may be considered by you as extenuating or reducing the degree of the defendant's blame of punishment.

(Emphasis added). However, despite the fact that the essence of mitigation is mercy and sympathy, the trial court also instructed the jury:

> You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence to decide all disputed questions of fact, to apply the instructions of the Court to your findings, and to render your verdict accordingly.
>
> In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your findings with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

(Emphasis added).

The instructions involved are standard jury instructions given in all criminal trials in Ohio. In fact the same instructions were given in the guilt phase of Petitioner's trial In guilt determinations the instructions are proper. However, when the same instructions invade the penalty phase of a capital trial grave constitutional problems occur.

The jury is told that it must consider mitigating evidence, evidence which by its definition is designed to evoke mercy from the jury by playing to its sense of sympathy. At the same time, however, the jury is told it cannot consider any sympathy factor. The result is a conflict which the jury can only resolve by ignoring any effect that the mitigating evidence had.

The conflict created by the "no mercy" instruction denies the defendant the opportunity to have the jury consider his mitigating evidence. Petitioner introduced evidence of his young age and his troubled past. Petitioner intended that the jury consider these factors for their sympathy value, when it passed sentence. The jury was told it could not consider the evidence for the very purpose for which it had been introduced. As a result, the jury did not properly consider the mitigating factors of Petitioner's age and past history, which was offered to it and which Lockett and Eddings command it must consider. Petitioner's death sentence is tainted by the fact that the jury was forbidden from considering all of the mitigating evidence before it.

The problem is exacerbated under the Ohio death penalty scheme. In Ohio the jury must weigh the aggravating circumstance against the mitigating circumstances. If it finds that the aggravating factors outweigh the mitigating circumstances, the jury must return a death verdict. When a jury cannot consider the

mitigating evidence for its only possible use, sympathy, it cannot find that the mitigation circumstances outweigh the aggravating circumstances. The "no mercy" instruction mandates a death verdict in all capital cases in Ohio.

REASONS FOR ISSUING THE WRIT

The issue of the "no mercy" instruction is presently before this Court, People v. Brown, 40 Cal. 3d 512, 709 P. 2d 44((1985), cert. granted sub nom California v. Brown, ___ U.S. ___, 106 S.Ct. 2274 (1986). This Court should issue a writ of certiorari in Petitioner's case, as it raises the same issue pending before this Court in Brown and disposition of the one case will automatically result in the disposition of the other.

III.

THE PROSECUTION'S REPEATED COMMENTS DURING VOIR DIRE AND CLOSING ARGUMENT AND THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT ITS DEATH VERDICT WAS ONLY A NON-BINDING RECOMMENDATION AND THAT THE TRIAL COURT WOULD MAKE THE ULTIMATE DECISION TO IMPOSE THE DEATH PENALTY DEPRIVED PETITIONER OF HIS RIGHT TO LIFE WITHOUT DUE PROCESS, AS THEY DIMINISHED THE JURY'S RESPONSIBILITY TO IMPOSE AN INDIVIDUALIZED DEATH SENTENCE IN THIS CAPITAL CASE.

Since the landmark decision in Furman v. Georgia, 408 U.S. 238 (1972), this Court has consistently struck down death penalty statutes which do not sufficiently provide for individualized deliberation to guarantee that the death penalty is not being imposed freakishly, wantonly or capriciously. Ohio, like many states, responded to the Furman mandate with a bifurcated trial that includes a guilt phase and a separate sentencing phase.

During the Ohio sentencing phase the jury weighs the aggravating factor or factors against any mitigating factors. If the jury finds beyond a reasonable doubt, that the aggravating factors outweigh the mitigatng factors, it must recommend death. The jury's death recommendation is not binding on the trial court. The judge does have the power to override the jury's death verdict and impose a life sentence. If, on the other hand, the jury finds the mitigating factors outweigh the aggravating factors, it can return a life recommendation. Such a recommendation is binding on the trial court. It cannot override a jury's life verdict and impose death.

It is inaccurate to say that the jury in Ohio has nothing to do with the sentence imposed. If the jury verdict is for life, death cannot be imposed. Therefore, the jury's verdict must receive the full panoply of Furman protections and safeguards in order to insure that any death verdict is the appropriate result of individualized deliberations and concerns. Anything that would hinder those individualized deliberations or reduce

the jury's sense of responsibility toward the deliberations renders a resulting death verdict so suspect, that it should be voided.

In Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985), four members of this Court unequivocally held that no death penalty may stand, when the jury has been "led to believe that the responsibility for determining the appropriateness of the defendant's death rests [elsewhere]." Caldwell, ___ U.S. ___, 105 S.Ct. at 2636. This Court reversed the death sentence imposed in Caldwell, because the prosecutor's closing argument, that any death sentence was automatically reviewable by the Mississippi Court of Appeals,

> urged the jurors to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death - a determination which would eventually be made by others and for which the jury was not responsible.

Caldwell, ___ U.S. ___, 105 S.Ct. at 2643.

Numerous responsibility-diminishing comments and arguments were made to the jury in Petitioner's trial. During voir dire either the prosecutor, the court, or both told jurors their death verdict was only a recommendation. During his closing argument in the penalty phase, the prosecutor told the jury:

> The issue for you ladies and gentlemen to decide in this particular case is an issue which has nothing to do with punishment in the sense that you must find whether or not the aggravating circumstances, that is the fact that Mrs. Chmielewski was killed while this defendant was committing aggravated robbery outweigh any mitigating factors. This is what your finding must be...
>
> The Court will instruct you on your proper role, ladies and gentlemen, and you must find -- if you find the aggravating circumstances outweigh the mitigating factors, you must make a recommendation to the Court but it's the Court, ladies and gentlemen, and I anticipate he will tell you that, that will make the ultimate decision in this case.

(Emphasis added). During the jury instructions of the sentencing phase, the trial court told the jury:

If all twelve of the jury find, by proof beyond a reasonable doubt, that the aggravating circumstance which Lewis Williams, Jr. was found guilty of committim outweighs the mitigating factors, then you must return such finding to the Court. I instruct you as a matter of law that if you make such finding, the you have no choice and must recommend to the Court that the sentence of death be imposed upon the defendant, Lewis Williams, Jr.

A jury recommendation to the Court that the death penalty be imposed is just that — a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the defendant rests upon this Court.

In the final analysis, after following the procedures and applying the criteria set forth in the statute, the Judge will make the decision as to whether the defendant, Lewis Williams, Jr., will be sentenced to death or to life imprisonment.

On the other hand, if after considering all of the relevant evidence raised at trial, the testimony, other evidence, the statement of Lewis Williams, Jr. and the arguments of counsel, you find that the State of Ohio failed to prove the aggravating circumstances which the defendant, Lewis Williams, Jr., was found guilty of committing outweigh the mitigating factors, then you will return your verdict reflecting your decision.

That is, you must find that the State has failed to prove beyond a reasonable doubt that the aggravating circumstances of which the defendant was found guilty of committing outweigh the mitigating factors. In this event, you will then proceed to determine which of the two possible life imprisonment sentences to recommend to the Court. Your recommendation to the Court shall be one of the following:

One: That Lewis Williams, Jr. be sentenced to life imprisonment with parole eligibility after thirty full years of imprisonment; or

Two: That Lewis Williams, Jr. be sentenced to life imprisonment with parole eligibility after twenty full years of imprisonment.

The particular recommendation which you make is binding upon the Court and the Judge must impose the specific life sentence which you have recommended.

(Emphasis added). In addition, the verdict forms, which were read in open court and which the jury had during its deliberation, emphasized the concept of a jury recommendation with the following language:

We the jury in this case, being duly impaneled and sworn, do find that the aggravating circumstances which the defendant, Lewis Williams, Jr., was found guilty of committing are sufficient to outweigh the mitigating factors presented in this case.

We the jury recommend the sentence of death be imposed on the defendant, Lewis Williams, Jr.

We the jury in this case, being duly impaneled and sworn, do find that the aggravating circumstances which the defendant, Lewis Williams, Jr., was found guilty of committing are not sufficient to outweigh the mitigating factors presented in this case in Count One, Specification No. One. We the jury recommend that the defendant, Lewis Williams, Jr. be sentenced to life imprisonment with parole eligibility after serving thirty full years in prison.

We the jury in this particular case, being duly impaneled and sworn, do find the aggravating circumstances which the defendant, Lewis Williams, Jr., was found guilty of committing are not sufficient to outweigh the mitigating factors presented in this case in Count One, Specification No. One. We the jury recommend that the defendant, Lewis Williams, Jr. be sentenced to life imprisonment with parole eligibility after twenty full years in prison.

(Emphasis added).

The "constitutionally impermissible" practice of informing the jury, that the responsibility for determining if death was appropriate lay with someone else, permeated Petitioner's trial. From the voir dire down to the jury forms the jury held during its deliberations on Petitioners' death, the jury had constant reminders that they could only recommend death, that the final decision of life or death was up to Judge Sweeney The rule in Caldwell was violated and violated repeatedly. The jury's decision as to the death sentence is, therefore, skewed and suspect. The death sentence imposed on Petitioner should be reversed.

The rule in Caldwell is that any statement which leads the jury to believe that someone other than the jury itself will make the ultimate decision on life or death, renders the jury's death verdict invalid, Caldwell, 105 S.Ct. 2639. The Caldwell opinion cited several reason why such statements require reversal.

When a jury knows someone will review and correct its death verdict, it may well recommend death in inappropriate cases. The jury might return a death verdict, even if it felt death was inappropriate, because it was sure the judge would correct it. In this way the jury could send a message of disapproval to the defendant, because it believed the judge, a learned and respected authority, would correct its error, Caldwell, 105 S.Ct. at 2641.

The jury may wish to escape from responsibility of deciding a literal matter of life or death. Thus, when the jury is told its life recommendation is binding but its death recommendation will be evaluated for appropriateness by the judge, the jury will recommend death to escape its duty. In that way the jury can insure that a judge reviews the decision and can delegate the responsibility for deciding on life or death to the judge. The jury would not be recommending death because it was appropriate, but because it would be the only way the jury could escape the awesome responsibility of deciding on another man's life, Caldwell, 105 S.Ct. at 2641.

The jury might also recommend death in close cases, in which it could not decide which penalty to impose. An undecided jury might well recommend death in order to insure that the judge, a man it regards as a respected and trained authority, can review the verdict and guarantee the proper result. Such juries would be deferring their responsibility to the judge. Again, the jury would recommend death, not because it was appropriate, but because it would be the only way to gain the desired judicial view, Caldwell, 105 S.Ct. at 2642.

For all of these reasons, the Caldwell Court ruled that statements which cause the jury to believe that the ultimate decision on life or death lies with someone else are inherently inaccurate. Even if the statement correctly sets out the prevailing statutory law, it is an inaccurate representation of the prevailing constitutional law, "because it depict[s] the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform," Caldwell, 105 S.Ct. at 2643.

As the jury in Petitioner's trial was told repeatedly that the trial judge would review a death verdict for appropriateness, it is possible that the jury did return its death verdict for one of the inappropriate reasons listed in the Caldwell decision. The same jury, had it not been conditioned to abrogate its sentencing responsibility to the trial court, may have returned a life verdict; a verdict which would have been binding and which would forever have precluded the State of Ohio from executing Petitioner. The Caldwell errors which occurred at Petitioner's trial did have a marked effect upon his fate.

In affirming Petitioner's sentence the Ohio Supreme Court relied on language from Justice O'Connor's lone concurrence to distinguish Petitioner's case from Caldwell, where she wrote, "I do not read Ramos to imply that the giving of nonmisleading and accurate information regarding the jury's role in the sentencing scheme is irrelevant to the sentencing decision...neither does Ramos suggest that the Federal Constitution prohibits the giving of accurate instructions regarding postsentencing procedures," Caldwell, ___ U.S. ___, 105 S.Ct. at 2646 (O'Connor, J., concurring, emphasis in original). The Ohio Supreme Court ruled that, as the instructions given were "an accurate statement of the law," then under Justice O'Connor's concurrence, there was no Caldwell error in Petitioner's trial, Williams, 23 Ohio St. 3d at 22.

The Ohio Supreme Court's reliance upon Justice O'Connor's concurrence is misplaced. It ignores the holding of the plurality, that all such statements and instructions are inaccurate, because they misstate the constitutional law and principles involved, Caldwell, ___ U.S. ___, 105 S.Ct. at 2643. In addition, the instructions in Petitioner's trial were not accurate so cannot stand, even under the concurrence.

The Ohio Supreme Court determined that the jury instructions in Petitioner's case correctly parroted the statutory provision, so were accurate. It ignored the fact that the issue of an instruction's accuracy is far broader than the simplistic question of whether it correctly describes the statute. For a jury instruction to be accurate it must not only correctly state the law, it must also be worded so that the jury cannot incorrectly interpret what is being told.

In Sandstrom v. Montana, 442 U.S. 510 (1979), the trial court instructed the jury, "the law presumes that a person intends the ordinary consequences of his voluntary acts." Sandstrom at 512. The instruction correctly described the legal principle involved. Nevertheless, this Court found the instruction to be inaccurate and constitutionally infirm, because the jury might have interpreted it as creating a conclusive presumption. In writing for the majority, Justice Brennan said, "The Supreme Court of Montana is, of course, the final authority on the legal weight to be given a presumption under Montana Law [Was the instruction a correct statement of the law?], but it is not the final authority on the interpretation which a jury could have given the instruction [Was the instruction accurate or misleading?]." Sandstrom, at 516-517. This Court found the instruction in Sandstrom to be infirm because the jury could have misinterpreted it. Sandstrom, at 519.

This Court must examine the jury instructions in Petitioner's case for their accuracy under Caldwell and Sandstrom. Even though the Ohio Supreme Court ruled them to be accurate, it is only the final authority on the technical correctness of the instructions, not on the interpretation the jury might have given the instructions.

The instructions given the jury in Petitioner's trial were:

> A jury recommendation to the Court that the death penalty be imposed is just that -- a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the defendant rests upon this Court.
>
> In the final analysis, after following the procedures and applying the criteria set forth in the statute, the Judge will make the decision as to whether the defendant, Lewis Williams, Jr., will be sentenced to death or to life imprisonment.

(Emphasis added). There are two ways the jury could have misinterpreted this instruction.

The trial judge told the jury he would sentence Petitioner, "after following the procedures and applying the criteria set forth in the statute." The jury might well have interpreted this instruction to mean after its verdict was in, the judge would hold additional proceedings to aid in his reviewing the verdict. The jury might also have believed that the "criteria" the judge would use would be different than the ones it used. Under this interpretation the jury would believe the judge, armed with additional facts learned in additional proceedings and using different criteria, would be in a far better position to impose sentence. The jury would vote for death, as it would be the only way to insure that the better equipped judge would sentence.

This possible interpretation is wrong. Under Ohio law there are no additional proceedings and no different criteria available to the judge. He is in no better a position to decide on the verdict than the jury is. However, because the inaccurate interpretation, which would produce an inappropriate death verdict, does exist, the instructions in Petitioner's trial were not accurate under Caldwell.

The instructions that "the final decision as to whether the death penalty shall be imposed upon the defendant rests upon this Court" could also lead the jury to believe that trial courts in Ohio routinely reject inappropriate death verdicts and correct the juries' errors. In such a case the jury, believing that any mistake it made would be corrected, would vote for death in order to insure the check offered by judicial review.

In actual fact trial courts do not routinely reject death verdicts. "As of February 17, 1986, sixty-three death sentences had been imposed under the Ohio statute. Of that number only one individual's death sentence was modified to life imprisonment by a trial court," Williams, 23 Ohio St. 3d at 35 (Wright, J., dissenting, emphasis in original. It is exactly the same false interpretation that death verdicts are routinely overturned on review, that Justice O'Connor called inaccurate, misleading, and reversible error, Caldwell, ___ U.S. ___, 105 S.Ct. at 2646-47. (O'Connor, J., concurring).

The instructions in Petitioner's case violate the rule established by both the plurality in Caldwell and Justice O'Connor's concurrence. The inaccurate instruction diminished the jury's sense of responsibility in Petitioner's trial. Petitioner's jury, after its sense of responsibility had been so impaired, was not able to make the individualized assessment of appropriateness

as to death that this Court requires. For this reason Petitioner's death sentence must be reversed.

Even if the trial court's contributions were correct and accurate, which they were not, the comments by the prosecutor were flagrantly inaccurate and misleading. The prosecutor told the jury that the decision before them had "nothing to do with punishment." This statement, which completely insulated the jury from any responsibility in sentencing, is patently untrue. Juries have everything to do with punishment in capital cases. A life verdict is binding. Death verdicts have been upheld in all but one of all capital cases in Ohio. Thus, what sentence the jury votes is likely to be the final sentence.

Caldwell dealt with a prosecutor's statements during closing arguments. The prosecutor's outrageous misstatement in Petitioner's trial is sufficient to bring it under the close scrutiny of Caldwell. In Caldwell this Court reversed a death sentence for improper arguments which mislead the jury as to the role of appellate review. Such comments are innocuous when compared to the arguments in Petitioner's trial, which mislead the jury as to its own role.

The prosecutor's arguments in Petitioner's trial told the jury it did not have to agonize over the difficult decision of Petitioner's life or death. The jury had nothing to do with sentence, sentence was up to the judge. These arguments did more than reduce the jury's sense of responsibility; they eliminated it. In light of Caldwell, Petitioner's death verdict cannot stand against the taint of the Prosecutor's improper and misleading argument.

REASONS FOR ISSUING THE WRIT

The Ohio Supreme Court has misinterpreted this Court's decision in Caldwell. Moreover, the ambiguity found by the plurality and concurring opinion create some confusion as to the validity of instructions such as the one given in Petitioner's trial. This Court should issue the Writ of Certiorari, so that it can correct the Ohio Supreme Court's misapplication of Caldwell, and so that it can clarify the ambiguity in and confusion caused by Caldwell.

CONCLUSION

The questions presented in this Petition for Writ of Certiorari are important questions regarding the Constitution of the United States and Ohio's death penalty structure. They are questions involving conflicts between state courts and federal appeals courts. Moreover, this Court has already determined that one of the questions presented in this Writ is of such importance that it has granted certiorari on the same questions in another case.

This Court should grant Petitioner, Lewis Williams, Jr., his Petition for Writ of Certiorari, so that the Court can address the important questions raised.

Respectfully submitted,

Robert M. Ingersoll
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CERTIFICATE OF SERVICE

I hereby certify that all persons required to be serve have been served and that I have sent by first class mail a copy of the foregoing Petition for Writ of Certiorari to John T. Corrigan, Cuyahoga County Prosecutor, The Justice Center - 8th Floor, 1200 Ontario Street, Cleveland, OH 44113 this 12th day of August, 1986.

Robert M. Ingersoll
ROBERT M. INGERSOLL
Counsel for Petitioner

86-5307

CERTIFICATE OF SERVICE

I hereby certify that all persons required to be served have been served and that I have sent by first class mail a copy of the foregoing Motion and attached Affidavit to John T. Corrigan, Cuyahoga County Prosecutor, The Justice Center - 8th Floor, 1200 Ontario Street, Cleveland, OH 44113 on this 12th day of August, 1986.

Robert M. Ingersoll

ROBERT M. INGERSOLL

Counsel for Petitioner Williams

APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

LEWIS WILLIAMS,

Petitioner,

-vs-

STATE OF OHIO,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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CONTENTS OF APPENDIX

The Supreme Court of Ohio

Columbus

1986 TERM

To wit: May 14, 1986

State of Ohio, Appellee,	:	Case No. 85-7
v.	:	REHEARING ENTRY
Lewis Williams, Appellant.	:	(Cuyahoga County)

It is ordered by the Court that rehearing in this case be, and the same is hereby, denied.

Frank D. Celebrezze

FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 14th day of May, 1986.

JAMES WM. KELLY CLERK

Daniel J. Crowley DEPUTY

The Supreme Court of Ohio
Columbus

1986 TERM

To wit: May 14, 1986

State of Ohio,
Appellee,

v.

Lewis Williams,
Appellant.

Case No. 85-7

E N T R Y

UPON CONSIDERATION of the motion filed by counsel for appellant to stay the execution of sentence in the above-styled cause,

IT IS ORDERED that said motion be, and the same is hereby, granted.

IT IS FURTHER ORDERED that the execution of sentence be, and the same is hereby, stayed pending the timely filing of an appeal to The Supreme Court of the United States.

IT IS FURTHER ORDERED that if such appeal is timely filed, this stay shall continue for an indefinite period pending final disposition of this cause by The Supreme Court of the United States.

Frank D. Celebrezze
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this 14th day of May, 1986.

JAMES WM. KELLY CLERK

Daniel J. Cooley DEPUTY

THE STATE OF OHIO, APPELLEE, v. WILLIAMS, APPELLANT.

[Cite as State v. Williams (1986), 23 Ohio St. 3d 16.]

Criminal law—Aggravated murder—Death sentence upheld, when.

(No. 85-7—Decided March 26, 1986.)

APPEAL from the Court of Appeals for Cuyahoga County.

On January 21, 1983, the body of Leona Chmielewski, a seventy-six-year-old woman, was discovered lying face down on the floor of her home. An autopsy revealed that the decedent had suffered multiple blunt force injuries to the head and neck, as well as a single gunshot wound fired from close range (approximately two feet or less) into the victim's face.

Witnesses established that the decedent was last seen between 10:00 and 10:30 p.m. the evening of the 20th, standing in her doorway talking with appellant, Lewis Williams. Between 10:30 and 11:00, the victim's neighbors heard a sound from her house like a door slamming. Appellant was arrested on January 22, 1983 and admitted being in the house the night of the murder, but denied perpetrating the offenses for which he was indicted.

The evidence produced at appellant's trial established the following sequence of events. Early in the evening of January 20, 1983, appellant and two acquaintances, Brent Nicholson and Tyrone Robinson, visited and had dinner with appellant's cousin, Kevin Samuels. Samuels lives across the street from the victim's house and had known her for several years. Prior to the night of the incident in question, appellant had stayed with Samuels and had known the victim.

On the evening of the 20th, Robinson and appellant left the Samuels residence, at approximately 9:00 p.m., to go to the store. Only Robinson returned a half-hour later, indicating appellant was still at the store. At trial, however, Robinson testified that appellant was in fact at Chmielewski's house, where he had apparently been invited in. The remarks to the contrary were merely to dissuade appellant's brother, Mark, who had arrived at the Samuels residence, from looking for appellant. Robinson eventually told Mark where appellant was, and the two of them went over to Chmielewski's house where Mark prevailed upon his brother to return some money. Mark left and Robinson went back to Samuels' house. Samuels sent Robinson back over to ask appellant to return to the Samuels residence. Appellant's responses were to tell Robinson he was not ready to leave and to call Samuels and tell him to mind his own business.

Samuels, Nicholson, and Robinson were driving down the driveway around 10:30 p.m. when Samuels saw appellant and Chmielewski at her door. They honked the horn, but appellant motioned for them to proceed without him. When Nicholson and Samuels returned, a little over an hour later, Nicholson went across the street to find that the door was open and Chmielewski's body was on the floor. Nicholson returned to the Samuels residence, whereupon Samuels called appellant's mother's home, then the police.

When the police arrived, at approximately 1:00 a.m., January 21, 1983, they found not only the body, but also several coins scattered near the doorway, numerous bank envelopes throughout the house and down to the street corner, decedent's purse with its contents emptied on the bedroom chest shelf, decedent's false teeth on the floor next to the body, and the phone off the hook. A subsequent police investigation revealed an imprint on the hem of the nightgown decedent was wearing which matched a portion of a shoe appellant was wearing the day of his arrest. Appellant's jacket sleeve cuff also contained a trace of lead powder.

In addition to the above evidence, the state presented two witnesses who were former cellmates of appellant while he was confined to the Cuyahoga County Jail pending trial. Michael Anderson and Navarro Brooks each testified that appellant had told them he had murdered the decedent. Specifically, Anderson testified that appellant had said he "stuck the gun in her mouth" to get her "to shut up." Brooks testified that appellant was worried about blood on his shoes apparently from pulling decedent's body over with his foot. After this testimony, the state rested, as did the appellant, without presenting any evidence.

The jury found appellant guilty of aggravated murder in violation of R.C. 2903.01, and the accompanying specification under R.C. 2929.04(A)(7) of having committed the aggravated murder in the course of committing an aggravated robbery, for which the death penalty could be imposed. The jury also found appellant guilty of aggravated robbery in violation of R.C. 2911.01, as well as the firearm specification contained in R.C. 2929.71.

On October 13, 1983, the sentencing phase of the trial commenced. Appellant presented three witnesses, his father, sister, and a friend, in addition to making an unsworn statement on his own behalf. The evidence in mitigation was essentially: that appellant was relatively young (twenty-four); that he came from a broken home; that he loved his mother more than himself; but that she rejected him; and that he elected to pursue a life of crime in order to compensate for a lack of love during his childhood. After more than twenty-three hours of deliberation, the jury returned a verdict, finding beyond a reasonable doubt that the aggravating circumstances outweighed the factors offered in mitigation, and sentencing appellant to death. This conviction and sentence were affirmed by both the trial court and the court of appeals, after each made an independent determination that the aggravating circumstances outweighed the mitigating factors.

The cause is now before this court upon an appeal as of right.

John T. Corrigan, prosecuting attorney, *Thomas S. Hudson* and *Thomas J. Sermon*, for appellee.

evidence is not a comment on the accused's failure to testify, where the comment is directed to the strength of the state's evidence and not to the silence of the accused, and where the jury is instructed, as here, to not consider the accused's failure to testify. *State* v. *Ferguson* (1983), 5 Ohio St. 3d 160. We find that the language used by the prosecutor in this case is not such that the jury would "naturally and necessarily" take it as comment on the failure of the accused to testify, and thus fails the test set forth in *State* v. *Cooper* (1977), 52 Ohio St. 2d 163 [6 O.O.3d 377], vacated on other grounds (1978), 438 U.S. 911. The prosecution is not prevented from commenting upon the failure of the defense to offer evidence in support of its case. *Lockett* v. *Ohio* (1978), 438 U.S. 586, 595 [9 O.O.3d 26]; *State* v. *Lane* (1976), 49 Ohio St. 2d 77, 86 [3 O.O.3d 45], vacated on other grounds (1978), 438 U.S. 911.

Appellant also takes exception to other prosecutorial closing remarks.[1] Although a conviction based solely on the inflammation of fears and passions, rather than proof of guilt, requires reversal (*State* v. *Agner* [1972], 30 Ohio App. 2d 96 [59 O.O.2d 208]), the statements in the instant case are not so inflammatory as to render the jury's decision a product solely of passion and prejudice against the appellant. *State* v. *Woodard* (1966), 6 Ohio St. 2d 14 [35 O.O.2d 8]. A request that the jury maintain community standards is not equivalent to the exhortation that the jury succumb to public demand as prohibited by the Eighth Appellate District in *State* v. *Cloud* (1960), 112 Ohio App. 208, 217 [14 O.O.2d 132]. Therefore, appellant was not denied his rights to a fair trial and an impartial jury.

Appellant's seventh proposition of law centers upon a claim that the evidence was so slight that "a reasonable hypothesis of innocence" must have remained, thereby establishing that the evidence could not demonstrate his guilt beyond a reasonable doubt. See *State* v. *Graves* (1978), 54 Ohio St. 2d 114, 118-119 [8 O.O.3d 113]. The evidence here was of a rifled purse, scattered coins, bank envelopes scattered throughout the

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[1] The prosecution's argument was as follows:

"MR. SAMMON: And notice, ladies and gentlemen of the Jury, in State's Exhibit 4, at least one good thing came out of this is the fact that Mrs. Chmielewski had her Bible open.

"And I'm just wondering if you gave her an opportunity to say her prayers before you shot her?

"* * *

"Now, ladies and gentlemen of the Jury, looking at this picture of State's Exhibit 4, I am reminded that the crime that was committed here was not only against the laws of society, but it was also against the laws of God. And now some people, ladies and gentlemen, have the benefit, when they reach an old age, of dying in bed with their relatives holding their hand and comforting them. This woman, who was such a good woman, was denied that privilege and right. And the last thing she saw was this defendant sticking a gun in her face and killing her.

"Ladies and gentlemen of the Jury, the standards of this community are dictated by jurors such as you who listen to evidence and see evidence and reach fair decisions in cases such as these.

"I ask you, ladies and gentlemen, to maintain the standards of this community."

house and down to the street corner, appellant's presence in the victim's house within two hours of her body being discovered and shortly after a dispute with his brother about money, traces of lead particles on appellant's jacket sleeve cuff, a shoeprint found on decedent's nightgown matching appellant's shoe, and two separate admissions of details of the crime to former cellmates. It is well established that the witnesses' credibility is for the trier of fact to judge and, if believed, as the jury must have here, the evidence establishes that any reasonable hypothesis of innocence has been eliminated.

Appellant in his eighth proposition of law argues that the trial court, by defining "proof beyond a reasonable doubt" as required by R.C. 2901.05, relieved the state of proving guilt beyond a reasonable doubt and of proving beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. This argument is similar to the one rejected by this court in *State* v. *Jenkins*, *supra*, at 211.

In his ninth proposition of law, appellant challenges as unconstitutional the sentencing instructions and prosecutor comment that the jury's recommendation of a death sentence is not binding on the court, and that the final decision as to whether the death penalty shall be imposed rests with the court. We specifically held that this instruction, though not preferred, does not constitute reversible error, *Jenkins*, *supra*, at 202-203, and the United States Supreme Court has recently denied certiorari in that case, *Jenkins* v. *Ohio* (1985), 473 U.S. ___, 87 L. Ed. 2d 643. Appellant nevertheless challenges these jury instructions on authority of *Caldwell* v. *Mississippi* (1985), 472 U.S. ___, 86 L. Ed. 2d 231. The United States Supreme Court there vacated a death sentence upon finding that a prosecutor's closing argument, urging the jury not to view itself as finally determining whether petitioner would die because a death sentence would be reviewed for correctness by the state supreme court, was inaccurate and misleading. The plurality of the court found that this diminished the jury's sense of responsibility which is indispensable to the Eighth Amendment's " 'need for reliability in the determination that death is the appropriate punishment in a specific case.' " *Id.* at 236, quoting *Woodson* v. *North Carolina* (1976), 428 U.S. 280, 305.

The *Caldwell* court felt that the state improperly created the impression that the appellate court would be free to reverse the death sentence if it disagreed with the jury's conclusion that death was appropriate. *Id.* at 246-247, fn. 7. Justice O'Connor noted that the case distinguished by the plurality, *California* v. *Ramos* (1983), 463 U.S. 992, does not "suggest that the Federal Constitution prohibits the giving of accurate instructions regarding postsentencing procedures." *Caldwell*, *supra*, at 248 (O'Connor, J., concurring). That is all that happened here; the judge told the jury that its death penalty recommendation is "just that—a recommendation, and is not binding upon the Court * * * [but that a life sentence] is binding upon the Court and the Judge must impose the specific life sentence which you

Hyman Friedman, county public defender, *Marillyn Pagan Damelio* and *Richard L. Gedeon*, for appellant.

Per Curiam. Today we are called upon to review the conviction and death sentence of appellant. The court of appeals held that appellant's assignments of error were not well-taken and that the death penalty statutes are constitutional and were constitutionally applied in the instant case. For the reasons set forth below, we affirm the appellate court's ruling and uphold the death penalty sentence.

Appellant's first proposition of law urges that he was denied his right to a fair trial by an impartial jury, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and R.C. 2945.25(C), when the trial court excused five jurors for cause. Upon review of the record, we determine that there was reasonable cause for the trial court to excuse a number of jurors on the basis of their own health, or personal problems at home needing their attention. Appellant, in his second proposition of law, argues that these rights were further denied by the so-called death-qualification process, authorized by *Witherspoon* v. *Illinois* (1968), 391 U.S. 510 [46 O.O.2d 368], and its progeny, prior to the guilt determination phase of his trial. These constitutional requirements have been embodied in R.C. 2945.25(C) and this court's decisions in *State* v. *Jenkins* (1984), 15 Ohio St. 3d 164, certiorari denied (1985), 473 U.S. ___, 87 L. Ed. 2d 643, paragraph two of the syllabus, and *State* v. *Maurer* (1984), 15 Ohio St. 3d 239, paragraph two of the syllabus. A review of the record demonstrates that the jurors were excused under the constitutional principles embodied in *Witherspoon*, *supra*; *Adams* v. *Texas* (1980), 448 U.S. 38, 45; and *Jenkins*, *supra*; i.e., their beliefs would lead them to ignore the law or violate the judge's instructions.

In his third proposition of law appellant argues that he was denied his right to confront witnesses by the trial court's protective order as to two of the state's witnesses. Confrontational rights are guaranteed to an accused through the Sixth and Fourteenth Amendments to the United States Constitution, *Pointer* v. *Texas* (1965), 380 U.S. 400, and by Section 10, Article I of the Ohio Constitution. Such rights are legitimately constrained by Crim. R. 16(B)(1)(e) which provides the trial court with authority to forbid disclosure of the names and addresses of witnesses "if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion." Certification is not satisfied by the prosecutor merely stating his or her conclusion that a witness might be subject to harm, but requires the state's reasons for requesting witness protection to appear on the record. *State* v. *Owens* (1975), 51 Ohio App. 2d 132, 147 [5 O.O.3d 109]. The reasons for withholding the identity of the state's witnesses who were also incarcerated in the Cuyahoga County Jail at the time, i.e., the high risk of repercussions for producing evidence against a fellow prisoner, do appear on the record. In any event, these witnesses' identities were not

absolutely withheld, as they were present at the trial and subject to cross-examination. Appellant has failed to show the sufficient degree of prejudice to his ability to defend himself required for a conviction reversal (*State* v. *Parson* [1985], 6 Ohio St. 3d 442, syllabus), given his failure to exercise the options offered by the trial court of requesting indefinite continuances and using investigators to prepare his cross-examination.

In his fourth proposition of law, appellant contends the trial court committed reversible error in finding him competent to stand trial. Appellant failed to produce any evidence to rebut the presumption, contained in R.C. 2945.37(A), that a criminal defendant is competent. Since the adequacy of the data relied upon by the expert who examined the appellant is a question for the trier of fact, and since there was some reliable, credible evidence supporting the trial court's conclusion that appellant understood the nature and objective of the proceedings against him, this court will not disturb the finding that appellant was competent to stand trial. See 5 Ohio Jurisprudence 3d (1978) 212, Appellate Review, Section 608.

Appellant next contends, in his fifth proposition of law, that he was denied his right to an impartial jury by admission of prejudicial or otherwise irrelevant evidence, specifically photographs of the scene of the crime and bank envelopes found outside the victim's home. We have recently held that: "Properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting the trier of fact to determine the issues or are illustrative of testimony and other evidence, as long as the danger of material prejudice to a defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number." *State* v. *Maurer*, *supra*, paragraph seven of the syllabus. In applying that statement of the law to the present case, we find, from an examination of the admitted photographs, no merit to appellant's contention that the trial court abused its discretion by authorizing their admission.

In his sixth proposition of law, appellant maintains that the trial court impermissibly allowed the state to comment upon his failure to testify in violation of *Griffin* v. *California* (1965), 380 U.S. 609 [32 O.O.2d 437], and that the prosecutor made several comments which inflamed the jury's passions to a degree justifying reversal. Specifically, appellant takes exception to the following portions of the prosecutor's closing argument:

"MR. SAMMON: Here they [Anderson and Brooks] come in and testify to you what this man [appellant] told them. And, again, ladies and gentlemen of the Jury, they [appellant] tell you they [Anderson and Brooks] were lying, but they offer no evidence to rebut that. * * * They could have brought somebody through those doors * * * and put them on the stand and say, 'No, Novarro Brooks and Michael Anderson were lying. It never took place.' * * * There is absolutely no evidence to contradict what they testified to, ladies and gentlemen."

A reference by the prosecutor in closing argument to uncontradicted

In proposition of law number seventeen appellant argues that Ohio's sentencing framework does not pass constitutional muster by failing to afford juries the opportunity to impose life sentences. The death penalty only becomes a mandatory sentence if the sentencing authority decides that the aggravating circumstances outweigh the evidence given in mitigation. R.C. 2929.04(B)(7) and (C) require "the sentencing authority to consider and weigh against aggravating circumstances any relevant mitigating factors which the defendant presents." *Jenkins, supra*, at 179. The statute does not require the jury to impose the death sentence instead of life imprisonment.

Appellant in his eighteenth proposition of law contends that the aggravating circumstances here did not, beyond a reasonable doubt, outweigh the mitigating factors. The aggravating circumstance was commission of a senselessly cruel aggravated murder in the course of an aggravated robbery. The meager evidence in mitigation was that the appellant pursued a life of crime to compensate for a lack of love in his childhood. The appellant failed to produce any evidence of the mitigating factors listed in R.C. 2929.04(B). In fact, the evidence produced at the trial and the mitigation hearing tends to establish that appellant's circumstances fall outside the diminished responsibility the legislative scheme implies it intends to have the jury take into account in imposing the death sentence. Appellant's explanation of his "life of crime" falls far short of mandating a holding that reasonable minds could never find, beyond a reasonable doubt, that, in the instant murder, the aggravating circumstances outweigh the mitigating factors. Our conclusion is that the aggravating circumstances do indeed outweigh the mitigating factors beyond a reasonable doubt.

In his nineteenth proposition of law, appellant argues that the death sentence imposed in the subject case is disproportionate to that imposed in similar cases, and is therefore violative of Sections 9, 10 and 16, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution. Appellant bases his argument on the fact that other capital defendants throughout Ohio, who were charged with only one aggravating circumstance, have received life sentences, rather than the death penalty.

The United States Supreme Court's concern that the death penalty not be imposed arbitrarily or capriciously, *Furman* v. *Georgia* (1972), 408 U.S. 238, upon which appellant's argument is based, has been held satisfied when death penalty-authorizing statutes require the sentencing authority to examine specific factors that argue in favor of, or against imposition of, the death penalty. *Proffitt* v. *Florida* (1976), 428 U.S. 242. States may constitutionally impose the death sentence if the discretion of the sentencing authority is " 'suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action' in imposing the sentence, *Zant* v. *Stephens* (1983), [462 U.S. 862,] 77 L. Ed. 2d 235, at

Ohio's "weighing statute" properly limits the sentencing authority's discretion to focus "attention upon the circumstances of the capital offense and the individual offender when considering whether to return a verdict imposing the death penalty." *Jenkins, supra*, at 173. It follows that "[m]erely counting the number of specifications charged does not demonstrate a disproportionate impact without reference to all aspects of the crimes." *State* v. *Maurer, supra*, at 246. Counting the specifications charged hardly takes into account all the particularized circumstances surrounding each capital offense and each individual offender, required by *Jurek* v. *Texas* (1976), 428 U.S. 262, 273-274. The United States Supreme Court has never found that the number of aggravating circumstances is the only factor permitted to be considered in a decision of whether to impose a death sentence.

As to appellant's final and twentieth proposition of law generally assailing the constitutionality of Ohio's death penalty statute, we find no merit therein. All of appellant's other challenges have previously been rejected by this court, in *Jenkins, supra*.

We reaffirm our holding in *Jenkins, supra*, paragraph one of the syllabus, that Ohio's capital punishment statutes are constitutional and affirm the judgment of the court of appeals that they were constitutionally applied in the instant case. Appellant's convictions and death sentence stand.

Judgment affirmed.

CELEBREZZE, C.J., LOCHER, HOLMES and DOUGLAS, JJ., concur.

SWEENEY, J., dissents.

C. BROWN and WRIGHT, JJ., dissent with opinion.

CELEBREZZE, C.J., concurring. While I join the majority decision upholding appellant's conviction and death sentence, I wish to add the following comments regarding several of the propositions of law raised by appellant.

The majority correctly concludes that neither the exclusion of several prospective jurors nor the death qualification process in the case *sub judice* violated appellant's right to a fair trial by an impartial jury. Appellant contends that the trial court improperly excused three jurors who, during *voir dire*, told the court that their moral views would make it impossible for them to impose the death penalty under any circumstances.[1]

[1] The pertinent portions of the dialogue between the court and each of these jurors was as follows:

"THE COURT: Listen, I know that you want to do your duty, and we appreciate your doing so.

have recommended." Under R.C. 2929.03(D)(2) and (3), the jury and the trial court each make an independent finding as to whether the aggravating circumstances outweigh the mitigating factors, thus justifying the death sentence. No Ohio court is bound by the jury's weighing of the mitigating circumstances, as opposed to the Mississippi scheme reviewed by the *Caldwell* court. In Mississippi the jury's verdict of death would not be overturned unless "it 'was against the overwhelming weight of the evidence,' or if the evidence of statutory aggravating circumstances is so lacking that a 'judge should have entered a judgment of acquittal notwithstanding the verdict,' " *id.* at 248, quoting *Williams* v. *State* (Miss. 1984), 445 So. 2d 798, 811. We find that the jury instructions in the instant case were an accurate statement of the law and, therefore, were relevant to the valid state interest in educating the jury on the applicable law. However, because of the possible risk of diminishing jury responsibility, "* * * we prefer that in the future no reference be made to the jury regarding the finality of their decision * * *." *Jenkins, supra*, at 202.

In his tenth proposition of law appellant contends that, at the conclusion of the penalty phase, the trial court erroneously instructed the jury not to be influenced by considerations of sympathy or prejudice. Even if appellant had followed the correct procedures for having this court review this issue, we specifically rejected this argument in *State* v. *Jenkins, supra*, paragraph three of the syllabus.

In his eleventh proposition of law, appellant urges that this court abandon the "beyond a reasonable doubt" standard applicable to all criminal proceedings pursuant to R.C. 2961.05(A). Not only did appellant waive this issue by not complying with Crim. R. 30(A), but we also expressly rejected this argument in *Jenkins, supra*, at paragraph eight of the syllabus.

In his twelfth proposition, appellant argues that the jury should have been instructed that a life imprisonment sentence does not require a unanimous vote. Not only was this issue not briefed and decided below, but this alleged reading of R.C. 2929.03(D)(2) ignores the requirement set forth in Crim. R. 31(A) that all verdicts in criminal proceedings be unanimous. Furthermore, we rejected this argument in *Jenkins, supra*, at 213-214, and held that: "In returning a sentence of life imprisonment under R.C. 2929.03(D)(2), the jury's verdict must be unanimous." *Id.* at paragraph ten of the syllabus.

In proposition of law thirteen, appellant contends that a capital defendant is entitled to a special verdict on the question of intent to kill. We rejected this argument, which appellant neglected to raise below, in *Jenkins, supra*, at 212-213, by stating that the General Assembly did not require it when it drafted R.C. 2903.01(D).

Appellant in his fourteenth proposition of law avers that the submission to the jury of the presentence investigative and mental examination reports under R.C. 2929.03(D)(1) denied him confrontational and due process rights, as well as contravened the Ohio Rules of Evidence. The latter

argument is without merit due to the fact that the Rules of Evidence do not apply to sentencing proceedings. Evid. R. 101(C)(3).

The United States Supreme Court has held that confrontational rights do not apply to all types of hearings. *Wolff* v. *McDonnell* (1974), 418 U.S. 539 [71 O.O.2d 336]. All that due process requires with respect to postconviction reports is giving the defendant a chance to rebut any alleged inaccuracies. See *Gregg* v. *Georgia* (1976), 428 U.S. 153, 189, fn. 37; *United States* v. *Papajohn* (C.A. 8, 1983), 701 F. 2d 760, 763; and *Farrow* v. *United States* (C.A. 9, 1978), 580 F. 2d 1339, 1360. Not only does appellant fail to argue that the reports were inaccurate, but he also failed to exercise the opportunity at the mitigation hearing to correct any erroneous information. Due process is not denied a defendant who fails to challenge the accuracy of statements as to which he has been denied an opportunity for cross-examination or confrontation. See *Williams* v. *New York* (1949), 337 U.S. 241, rehearing denied (1949), 337 U.S. 961; *Williams* v. *Oklahoma* (1959), 358 U.S. 576, rehearing denied (1959), 359 U.S. 956. R.C. 2947.06 authorizes a defendant's cross-examination, under oath, of the persons who compiled the report of a psychologist or psychiatrist, "as to any matter or thing contained therein." The appellant failed to exercise this right and cannot now be heard on a complaint that the admission of these reports, prepared at his own request, under R.C. 2929.03(D)(1), prejudiced him.

In his fifteenth proposition of law, appellant contends that the prosecutor's review, in closing argument, of the mitigating factors specifically set forth by the General Assembly in R.C. 2929.04(B), and argument that appellant failed to adduce evidence satisfying any of these factors, unfairly and prejudicially interfered with the sentencing determination. Not only was this argument not briefed and decided below, but also the trial court corrected any possible harm by correctly instructing the jury, shortly after the prosecutor's argument, that statutory as well as non-statutory mitigating factors may be proffered and considered in mitigation. In any event, any attorney misconduct is not material since the prosecutor never told the jury that the statutory factors were all that could be considered. Appellant's argument is without merit.

Appellant next challenges, in his sixteenth proposition of law, the constitutionality of R.C. 2929.03 and 2929.04 on the basis that the aggravating circumstances fail to distinguish the murderers who deserve the death penalty from those who do not. According to the appellant, the conduct used to convict him (*i.e.*, murder in the course of a robbery pursuant to R.C. 2903.01[B]) was also used to aggravate the offense to one in which the death penalty could be imposed under R.C. 2929.04(A)(7). This precise argument was rejected in *Jenkins, supra*, at 178. There we found that, "any duplication is the result of the General Assembly having set forth in detail when a murder in the course of a felony rises to the level of a capital offense, thus, in effect, narrowing the class of homicides in Ohio for which the death penalty becomes available as a sentencing option."

Appellant's death-qualification argument is virtually identical to that rejected by this court in *State* v. *Jenkins* (1984), 15 Ohio St. 3d 164, 188, wherein we stated:

"It follows that, in striving to achieve an impartial jury—one that will fairly judge the facts and apply the law as instructed—the principles set forth in *Witherspoon*, *supra* [(1968), 391 U.S. 510], justify excluding those jurors who would never impose the death penalty. Jurors subject to challenge under *Witherspoon* because they refuse to follow the law not only render the jury impartial for the penalty phase, but also for the guilt phase, of the trial as well. * * *"

In essence, appellant argues that what has resulted by the *voir dire*

"This is a very difficult case involving the death penalty or a potential death penalty, and we don't want to put words in your mouth. And you seem to be saying, and I want to be fair, and I don't want to put words in your mouth, but that you don't believe in the death penalty, but you would like to do you duty; is that correct?

"MRS. WINISKI: That is correct.

"THE COURT: That is essentially correct?

"MRS. WINISKI: That is correct.

"THE COURT: And then that question of Mr. Sammon's is a fair one, that you really couldn't return a verdict for the death penalty if the facts warranted it, and you wouldn't follow the law?

"MRS. WINISKI: I don't think so.

"THE COURT: Fine. She is excused for cause."

"DR. LARSON: Yes, I understand it, because this, in a sense, I didn't get when I said previously that I would follow the law.

"THE COURT: Yes.

"DR. LARSON: I think it would—the answer would still stand. I would try to follow the law, but it still might be impossible for me."

"THE COURT: * * * You indicated that you would, when Mr. Oliver told you you were to follow the instructions of the Court.

"MR. MELENIK: Right.

"THE COURT: But my impression were, when Mr. Sammon asked you if you would follow the instructions of the Court, and the instructions of the Court, if they indicated that under certain circumstances that you must impose the death sentence, you couldn't follow the instructions of the court; is that your answer, or not?

"MR. MELENIK: I think, yeah, I probably made a mistake. I couldn't follow the instructions of the Court, if they were to impose the death sentence.

"THE COURT: You could?

"MR. MELENIK: I could not.

"THE COURT: You could not?

"MR. MELENIK: I could not. I am sorry.

"THE COURT: Okay. I think that this is probably—

"MR. SAMMON: Could I just ask one more question, Judge?

"THE COURT: Yes.

"MR. SAMMON: All right. Are you saying, Mr. Melenik, under no circumstances would you follow the instructions of the Trial Judge and consider for the imposition of the death penalty?

"MR. MELENIK: I would not consider the death penalty at all.

"THE COURT: Thank you."

herein is a jury more likely to convict, rather than an impartial jury. As was stated in *Smith* v. *Balkcom* (C.A. 5, 1981), 660 F. 2d 573, 579, certiorari denied (1982), 459 U.S. 882:

"* * * The guarantee of impartiality cannot mean that the state has a right to present its case to the jury *most* likely to return a verdict of guilt, nor can it mean that the accused has a right to present his case to the jury *most* likely to acquit. But the converse is also true. The guarantee cannot mean that the state must present its case to the jury *least* likely to convict or impose the death penalty, nor that the defense must present its case to the jury *least* likely to find him innocent or vote for life imprisonment. * * *" (Emphasis *sic.*)

Moreover, this court's decision in *Jenkins* is consistent with the United States Supreme Court's recent pronouncement in *Wainwright* v. *Witt* (1985), 469 U.S. ___, 83 L. Ed. 2d 841, which affirmed the pronouncement set forth in *Adams* v. *Texas* (1980), 448 U.S. 38, 45, "* * * as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment." *Wainwright*, *supra*, at 851. In *Adams*, the high court held that a "state may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Id.* at 45. In *Wainwright*, *supra*, the court reaffirmed *Adams* and clarified *Witherspoon*, stating at 851:

"But there is nothing talismanic about juror exclusion under *Witherspoon* merely because it involves capital sentencing juries. *Witherspoon* is not grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment. Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of, and we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor."

These three prospective jurors were dismissed precisely because they stated that they could not, for personal and moral reasons, conscientiously apply the law as instructed by the court. Thus, these persons were properly excluded in a manner consistent with *Witherspoon*, *Adams*, *Wainwright* and *Jenkins*, *supra*.[3] Accord *Foster* v. *State* (Md. App. 1985), 499 A. 2d 1236.

[3] In reaching our conclusion today, we are aware of the recent split decision of the Eighth Circuit Court of Appeals, sitting *en banc*, in *Grigsby* v. *Mabry* (C.A. 8, 1985), 758 F. 2d 226, certiorari granted (Oct. 7, 1985), *sub nom. Lockhart* v. *McCree* (1985), 474 U.S. ___, 88 L. Ed. 2d 48.

In *Grigsby*, the federal court of appeals held that in the guilt phase of a capital trial a jury with "*Witherspoon* excludables" stricken for cause results in a jury which is conviction prone and which violates a defendant's Sixth Amendment right to a fair and impartial jury.

The Eighth Circuit's decision is in direct conflict with, *inter alia*, the decisions of the

Appellant also complains that the trial court's exclusion of two other prospective jurors was part of a pattern of dismissing for personal reasons any juror who had expressed reservations about imposing the death penalty. The record demonstrates that this argument is without merit.

One of those jurors was excused on the basis that the nature and length of a capital trial would have made it very difficult for her to care for her eighty three year old mother, who had recently become ill. The other juror was excused because the responsibilities of jury service would aggravate her nervous condition, causing stomach problems, insomnia and physical shaking. These were legitimate reasons for dismissal of these individuals. We can discern no pattern of dismissing, for personal reasons, only those jurors opposed to the death penalty and note that a third juror was dismissed due to personal anxiety even though he had expressed no reservations concerning the death penalty.

The majority also correctly concludes that there was reliable and credible evidence to support the trial court's determination that appellant was competent to stand trial. Pursuant to R.C. 2945.37(A), a defendant is presumed to be competent and must carry the burden of proving, by a preponderance of the evidence, that he is not competent to stand trial. Accord *State* v. *Chapin* (1981), 67 Ohio St. 2d 437 [21 O.O.3d 273].

The standard for determining competency was set over a quarter century ago in *Dusky* v. *United States* (1960), 362 U.S. 402, where the United States Supreme Court framed the test as whether the accused has a ra-

Fourth and Fifth Circuit Courts in *Smith* v. *Balkcom* (C.A. 5, 1981), 660 F. 2d 573, certiorari denied (1982), 459 U.S. 882; and *Keeten* v. *Garrison* (C.A. 4, 1984), 742 F. 2d 129.

As alternatives to the striking for cause of so called *Witherspoon* excludables during the guilt phase of a capital trial, the Eighth Circuit recommended adding to the number of alternate jurors who sit during the guilt phase. If the defendant is convicted, a new *voir dire* would take place and the jury death qualified, with the "*Witherspoon* excludables" stricken for the penalty phase. The court of appeals also proposed, as an alternative, identifying the "*Witherspoon* excludables" at the initial *voir dire* and empaneling sufficient alternate jurors to take their places after the guilt phase and during the penalty phase of a capital trial.

Although the United States Supreme Court will ultimately determine the validity of the Eighth Circuit's decision, we agree with the dissenters in that decision who found it both dangerous and ill-advised to require, in essence, two groups of jurors in a capital trial:

"Placing the moral responsibility on the same group of jurors to decide both guilt and punishment is justified by the most significant policy considerations. When one jury hears both phases of the case, the jurors that comprise it cannot evade the heavy responsibility placed upon them of whether a convicted person should receive the death penalty. The court today would seem to require the replacement of some members of the guilt-phase jury with death-qualified jurors for the purpose of considering the death penalty. This division of responsibility between the two groups, even if only a few are replaced, would dilute accountability and disadvantage the accused." *Grigsby*, *supra*, at 247.

Indeed, it is precisely such a diminished sense of responsibility among juror s with which the United States Supreme Court was concerned in *Caldwell* v. *Mississippi*, *supra*.

We also note that the Eighth Circuit did not, in writing its opinion, have the benefit of the Supreme Court's decision in *Wainwright* v. *Witt* (Jan. 21, 1985), 469 U.S. ___, 83 L. Ed. 2d 841.

tional and factual understanding of the proceedings against him as well as the present ability to consult with his lawyer with a reasonable degree of rational understanding.

In the case *sub judice*, the expert concluded that appellant was able to understand the nature of the proceedings against him and was able to assist in his defense. Because appellant produced no evidence to the contrary, the trial court correctly concluded that he failed to prove his incompetency by a preponderance of the evidence pursuant to R.C. 2945.37(A).

The majority properly finds no merit in appellant's contention that the trial court abused its discretion in admitting photographs of the scene of the crime and bank envelopes scattered outside the victim's home. Certainly the photographs of the scene were relevant insofar as the state sought to prove the circumstances surrounding this killing and the cause of Chmielewski's death. Further, these photographs were important to the state's proof of its contention that an imprint on the hem of Chmielewski's nightgown matched a portion of the shoe which appellant was wearing at the time of his arrest. These photographs were not pleasant viewing. They were not, however, so gruesome or gory as to inflame the passions of the jury to the material prejudice of appellant.

A number of bank envelopes were also admitted. This was because bank envelopes had been scattered in a trail leading from the scene of this crime, inside the home, into the street. This evidence was clearly relevant to illustrate the state's contention that this killing was committed in the course of an aggravated robbery, during which the killer rifled through the victim's bank envelopes and discarded them in his wake as he fled the home. Thus, the probative value of these photographs and bank envelopes outweighed the danger of any prejudice to appellant and were properly admitted.

In the case *sub judice*, appellant has also challenged as unconstitutional the prosecutor's comment in closing argument[4] and the trial court's instruction[5] informing the jury that its death sentence was a recommenda-

[4] Appellant objects to the following statement made by the prosecutor in closing argument:

"MR. SAMMON: The Court will instruct you on your proper role, ladies and gentlemen, and you must find—if you find the aggravating circumstances outweigh the mitigating factors, you must make a recommendation to the Court, but it's the Court, ladies and gentlemen, and I anticipate he will tell you that, that will make the ultimate decision in this case."

[5] The portion of the trial court's instruction to which appellant objects is as follows:

"A jury recommendation to the Court that the death penalty be imposed is just that—a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the defendant rests upon this Court.

"In the final analysis, after following the procedures and applying the criteria set forth in the statute, the Judge will make the decision as to whether the defendant, Lewis Williams, Jr., will be sentenced to death or [illegible]."

tion not binding upon the court. Appellant bases this challenge on the recent United States Supreme Court decision *Caldwell v. Mississippi* (1985), 472 U.S. ___, 86 L. Ed. 2d 231. The majority properly points out that the situation in *Caldwell* is not applicable to the case *sub judice*, but relies mainly on Justice O'Connor's concurrence in order to distinguish *Caldwell*. I believe that the plurality opinion should also be addressed and distinguished.

The issue as framed by Justice Marshall was "whether a capital sentence is valid when the sentencing jury is led to believe that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case." *Caldwell, supra*, at 235-236. The prosecutor in *Caldwell* told the jury that its decision to impose the death penalty was not final, but rather was automatically reviewable by the Mississippi Supreme Court. The plurality stated that this "delegation" of sentencing responsibility encouraged by the prosecutor deprived the defendant of his right to a fair determination of the appropriateness of the death sentence because an appellate court, unlike the jury, was "ill-suited to evaluate the appropriateness of death in the first instance." *Caldwell, supra*, at 240. The court emphasized that the defendant in a capital trial has a constitutional right to full consideration of mitigating factors by those very persons who were present to hear the evidence, witnesses and argument. *Id.* The court concluded that the prosecutor's remarks had diminished the jury's sense of responsibility by urging jurors "to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death—a determination which would eventually be made by others and for which the jury was not responsible." *Id.* at 244. The *Caldwell* court stated further that the presumption of correctness with which Mississippi's appellate courts reviewed capital sentences made it impossible for an appellate court to determine the appropriateness of the death penalty in each defendant's individual circumstances.

The prosecutor's remarks and the instructions in the case *sub judice*, which informed the jury that its determination to impose the death penalty was a recommendation, must be examined in light of the *Caldwell* pronouncement. The final decision as to the appropriateness of the death penalty, the jury was told, was to be made by the trial court. No mention was made of appellate review.

These remarks and instructions were a correct statement of Ohio law. Under our statutory scheme, as opposed to that in Mississippi, the jury does not have sole responsibility for determining the appropriateness of death in the first instance. Its role is to make a recommendation to the trial judge, who makes the actual determination by *independently* weighing the aggravating circumstances and the mitigating factors after receiving the jury's recommendation that the sentence of death be imposed. R.C. 2929.03(D)(2) and (3). Even if the jury's sense of responsibility

was affected by knowledge of its role, the trial court, with whom the decision to impose the death penalty rests, serves as a check and balance for a jury's verdict which may not be appropriate. Although Ohio's statutory scheme does not place sole responsibility for sentencing on the jury in a capital case, we note that in the case *sub judice* the jury deliberated for twenty-three hours in the penalty phase alone, indicating that its appreciation of the gravity of its determination had not been diminished by the prosecutor's remarks or the court's instruction.*

Further, addressing the plurality's concern in *Caldwell*, the appropriateness of the death sentence in the case *sub judice* was determined in the first instance by those same persons who had been present throughout this trial to hear the evidence, witnesses, argument and mitigating factors—the jury *and* the trial judge. Additionally, there is nothing in the record which shows that either the jury or the trial judge was misled as to the nature of appellate review of capital cases in the state of Ohio. Indeed, our statutory scheme, in contrast to the presumption of correctness in Mississippi, mandates full and independent review and reweighing by appellate courts of the appropriateness of penalty determinations in each capital case. R.C. 2929.05(A). Thus, the case *sub judice* is readily distinguishable from *Caldwell, supra*. In Ohio, the appropriateness of a death sentence is *fully* considered at every stage from the jury's recommendation to the trial court's actual determination and, finally, by independent appellate review by both the court of appeals and state supreme court. For the foregoing reasons, I concur in the majority's conclusion that the *Caldwell* decision does not require the reversal of appellant's convictions.

Finally, I wish to add a caveat regarding the majority's conclusion (in

* It should also be noted that the record demonstrates that the trial judge endeavored to instill in the jury the importance of its role and indeed heightened the jury's sense of responsibility.

For example, the trial judge, prior to the jury's deliberation, instructed the jurors, inter alia, that:

"You decide the disputed issues and the Court provides you with the instructions of law. It is your sworn duty to accept these instructions and to apply the law as it is now given to you by me. You are not permitted to change the law, nor to apply your own conception of what you think the law should be, nor to disregard the law in order to avoid an unpleasant decision.

"Your initial conduct upon entering the jury room is a matter of importance. It is not wise immediately to express a determination to insist upon a certain verdict because if your sense of pride is aroused, you may hesitate to change your position even if you decide you are wrong.

"Consult with one another, consider each other's views and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself, but you should do so only after a discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if convinced that it is wrong. However, you should not surrender honest convictions in order to be congenial or to reach a verdict solely because of the other jurors."

overruling appellant's fourteenth proposition of law) that the Rules of Evidence do not apply to sentencing proceedings. This sweeping statement is not altogether correct as regards the penalty phase of a capital trial.

Both Fed. R. Evid. 1101 and Ohio Evid. R. 101 state that the Rules of Evidence do not apply at proceedings for sentencing. It appears, however, that this statement is not meant to be as broad as it might seem. Two commentators note by way of explanation pertaining to Fed. R. Evid. 1101 that "despite the fact that Congress has chosen to provide that the Federal Rules of Evidence should not apply during most preliminary and post-trial parts of litigation, the fact remains that many of the Rules will be borrowed and continued in effect during these proceedings. Most of the Congressional concern was with the hearsay rule, and it is difficult to imagine that Congress intended that witnesses should testify without taking an oath, that interpreters should not be provided for non-English speaking persons, and that proper objections should not be made to offers of evidence in proceedings other than trials on the merits." Saltzburg & Redden, Federal Rules of Evidence Manual (3 Ed. 1982), at 761. As the authors note, Fed. R. Evid. 1101 may be interpreted essentially as a restriction on the application of the hearsay rule. *Id.* Indeed, R.C. 2929.03(D)(1) contains a specific exception to the hearsay rule which allows admission of presentence reports in the mitigation phase of death penalty trials.

The United States Supreme Court stated in *Gregg v. Georgia* (1976), 428 U.S. 153, 203-204 that "[s]o *long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant*, it is preferable not to impose restrictions." (Emphasis added.) The important protections provided by the Rules of Evidence can not be swept out the door in the penalty phase of a capital case because they are reflective in many instances of important constitutional and procedural safeguards. As illustrated by the foregoing, Fed. R. Evid. 1101 and its counterpart, Ohio Evid. R. 101, restrict the application of the hearsay rule in sentencing proceedings but are not meant to deny the application of the Rules of Evidence altogether during the penalty phase of a capital trial.

Accordingly, I agree with the majority that appellant's pre-sentence investigative and mental examination reports were admissible during the penalty phase. See R.C. 2929.03(D). I caution, however, that today's holding is not a carte blanche waiver of all the critical protections afforded by our Rules of Evidence which are crucial to the fair and just determination of the truth in *all* criminal proceedings. See Evid. R. 102.

For all the foregoing reasons, I concur in the majority's decision to affirm appellant's convictions and sentence of death.

WRIGHT, J., dissenting. Defendant-appellant Williams has challenged the constitutionality of the trial judge's specific instructions and the prose-

would not be final or binding. These comments and instructions occurred during the sentencing phase of the trial. The court instructed the jury that its "recommendation" would not be final because the final decision as to the imposition of the death penalty rested with the court. As the majority correctly states, this was an accurate precis of Ohio law. This court previously disapproved of this form of instruction and argument but held that it was not reversible error in *State v. Jenkins* (1984), 15 Ohio St. 3d 164, at 202-203. The United States Supreme Court denied certiorari in that case, *Jenkins v. Ohio* (1985), 473 U.S. ___, 87 L. Ed. 2d 643, but subsequently *unanimously* remanded to this court a case raising the same issue, *State v. Rogers* (1985), 17 Ohio St. 3d 174, 176-177, vacated *Rogers v. Ohio* (1985), 474 U.S. ___, 88 L. Ed. 2d 452, for our reconsideration in light of the holding announced on June 11, 1985 in *Caldwell v. Mississippi* (1985), 472 U.S. ___, 86 L. Ed. 2d 231.

I believe that the majority has misread both the thrust and content of *Caldwell*. In *Caldwell*, the court reviewed the prosecutor's comments to the jury in his closing argument that "* * * your decision is not the final decision * * *" because "the decision you render is automatically reviewable by the Supreme Court [of Mississippi] * * *." *Id.* at 227. In a plurality opinion (Justice Marshall, joined by Justices Brennan, Blackmun and Stevens, Justice O'Connor concurring in part; Justice Powell not participating), the court overturned the death sentence imposed by the jury and concluded that "* * * it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death [sentence] rests elsewhere. * * *" *Id.* at 239.

Justice Marshall determined that the prosecutor's statements in *Caldwell* were inaccurate and "wholly irrelevant to the determination of the appropriate sentence." *Id.* at 244. Justice O'Connor agreed that the prosecutor's statements in *Caldwell* were both misleading and inaccurate. *Id.* at 247. Both justices distinguished *California v. Ramos* (1983), 463 U.S. 992, in which the court upheld the constitutionality of a California statute requiring capital sentencing juries to be instructed that the governor of the state could commute a life sentence without possibility of parole to a lesser sentence with parole eligibility. See *Caldwell, supra*, at 243-244 and 247-249. Justice Marshall observed that the propriety of the instruction in *Ramos* rested on its relevancy to a legitimate state penological interest. *Id.* at 243. Justice O'Connor noted that *Ramos* would not prevent the giving of nonmisleading and accurate instructions concerning postsentencing procedure. *Id.* at 247. Justice Rehnquist, writing for himself, Chief Justice Burger and Justice White in dissent, relied on *Ramos* in arguing that the prosecutor's statements in *Caldwell* were constitutionally permissible because any misleading implications were cured by later statements. *Id.* at 254.

Unlike the law of many states, Ohio law provides for *de novo* review of

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 47853

State of Ohio

Plaintiff-Appellee

-vs-

Lewis Williams, Jr.

Defendant-Appellant

SUPPLEMENTAL
JOURNAL ENTRY
AND
APPELLATE REVIEW
OF DEATH SENTENCE

DATE OF ANNOUNCEMENT
OF DECISION: OCT 25 1984

CHARACTER OF PROCEEDING: Criminal Appeal from Common Pleas Court Case No. CR-179814

JUDGMENT: Affirmed.

DATE OF JOURNALIZATION:

APPEARANCES:

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FOR DEFENDANT-APPELLANT

JACKSON, J.:

Pursuant to requirements set forth in R.C. §2929.05(A), this Court has reviewed all of the facts and evidence in this case, as well as the judgment and sentence of the trial court; thus, this Court makes the following finding:

1) The offense and aggravating circumstance which the appellant was found guilty of committing was proven beyond a reasonable doubt.

2) The aggravating circumstance outweighs any factors in mitigation of the sentence of death.

3) The trial court properly weighed the aggravating circumstance and the mitigating factors.

4) The sentence of death is appropriate and is neither excessive nor disproportionate to the penalty imposed in similar cases disposed of in the 8th Appellate District Court of Appeals of Ohio.

MARKUS, P.J., _____

ANN McMANAMON, J., CONCUR _____

Lee A. Jackson

JUDGE LEO A. JACKSON

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 47833

State of Ohio

Plaintiff-Appellee

-vs-

Lewis Williams, Jr.

Defendant-Appellant

JOURNAL ENTRY
and
OPINION

DATE OF ANNOUNCEMENT OF DECISION: OCT 13 1983

CHARACTER OF PROCEEDING: Criminal Appeal from Common Pleas Court Case No. CR-179814

JUDGMENT: Affirmed.

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JACKSON, J.:

Appellant was indicted[1] on charges of aggravated murder[2] with specifications[3] and aggravated robbery[4] of Mrs. Leona Chmielewski, a 75 year old widow. A jury found him guilty on all counts, and recommended that the death penalty be imposed. The trial court reached the same conclusion, finding that the aggravating circumstance outweighed the mitigating factors presented by the defense.

The appellant hereby appeals, assigning eighteen assignments of error.

I. THE EVIDENCE

The state adduced the following evidence to demonstrate guilt:

(1). Appellant's friends and relatives testified that as they left to go to the hospital they saw appellant alone with the victim, at her home, at about 10:00 or 10:30 p.m. The front door of the victim's house was open.

(2). Between 10:15 and 10:45 the victim's neighbors heard a sound like a door slamming, coming from the victim's home.

(3). Between 11:30 and 12:30, the victim was found dead, by relatives of appellant, when they returned from the hospital. The victim was face down on the floor near the front door. She had been beaten about the head and neck with a blunt object, and shot through the mouth. Bloodstains

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1/ Appellant was also indicted on separate charges of robbery, aggravated burglary and theft. These counts were severed on the motion of the appellant.

2/ Aggravated murder is a violation of R.C. 2903.01.

3/ There were two specifications to the charge of aggravated murder. The first specification was that this murder was committed in the perpetration of an aggravated robbery. This specification constituted the "aggravating circumstance" for which the death penalty was imposed, pursuant to R.C. 2929.03 and 2929.04. The second specification was that this offense was committed with a firearm. This specification carried with it a punishment of three years actual incarceration, pursuant to R.C. 2929.71.

4/ Aggravated robbery is a violation of R.C. 2911.01.

were found in her bedroom. Her purse had been overturned in the bedroom, and her wallet was missing. A trail of coins led to the front door, and a trail of empty bank envelopes led down the street to an intersection.

(4). The victim had been fearful of strangers, and would not open the door to anyone whom she did not know. She knew and was friendly with the appellant. The other doors and windows of her house were locked.

(5). A small imprint of seven parallel lines on the victim's nightgown matched the pattern on the left heel of appellant's shoe.

(6). A particle of lead, and a small patch of lead residue, were found on the left sleeve of appellant's jacket. The trace evidence expert from the coroner's office testified that this finding was consistent with gunshot residue.

(7). Two inmates of the county jail testified that appellant admitted to them that he had shot the victim. Appellant allegedly told both of them that he had shot her in the mouth. He told one of them that he had rolled over the victim's body with his shoe, and that he was afraid that the police would find blood on the shoe.

(8). The appellant presented no evidence in his own behalf at trial. He had admitted to police that he had visited the victim that evening, but denied that he had robbed or killed her. He first stated to police that he had left her home at 8:00 p.m.; later he changed this to 10:00 p.m.

Upon this evidence the appellant was found guilty of aggravated murder with specifications and aggravated robbery.

II. COMPETENCY TO STAND TRIAL

Assignment of Error No. 1.

Appellant contends that the court erred in finding appellant competent to stand trial. Appellant was examined by Dr. Magdi Riza[5] on June 17, 1981, and again on September 22, 1981, the day before

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5/ Dr. Riza is a board certified forensic psychiatrist. He is Medical director of Case Western Reserve Hospital, and is on the

trial commenced. A hearing on the issue of competency was held on September 21, 1983, at which Dr. Rizk testified. Dr. Rizk found that the appellant was able to understand the nature and objective of the proceedings against him, and that appellant was able to assist in his own defense. (Tr. 43-44).

Specifically, Dr. Rizk noted that the appellant had never been treated for mental illness [6] (Tr. 22); that he demonstrated no symptoms of mental illness (Tr. 22); that appellant initially refused to submit to an examination on the issue of legal insanity, because he anticipated that statements made by him might be introduced into evidence as an admission of guilt (Tr. 21); and that appellant refused to cooperate, lied, and then told him another story. (Tr. 28).

The appellant adduced no evidence on the issue of his competency to stand trial.

There is a rebuttable presumption that a criminal defendant is competent to stand trial. The burden is upon the defense to prove that the defendant is not competent. R.C. 2945.37(A). The appellant in the case at bar failed to overcome this presumption. In fact, the only evidence adduced at the competency hearing tended to establish that appellant was competent.

The first assigned error is not well taken.

III. PROTECTIVE ORDER AS TO IDENTITY OF STATE'S WITNESSES

Assignment of Error No. 2.

Appellant contends that the trial court committed reversible error by granting appellee's pretrial request for a protective order

6/ Dr. Rizk testified that the appellant told him he had never received psychiatric treatment. (Tr. 24). The social worker affi-

as to the identities of two of appellee's witnesses. Prior to trial, the defense filed a motion to compel the prosecution to reveal the names and addresses of the witnesses that it intended to call at trial. The prosecutor filed a motion for a protective order with respect to two witnesses, stating that these witnesses would be placed in danger if their identities were disclosed prior to trial. [7] The trial court granted the state a protective order, on the ground that the witneses were in jail, and were afraid of reprisals from other prisoners should it become known that they had "snitched." The court also ruled that following direct examination of the witnesses, defense counsel would be permitted to take "whatever time they feel is necessary" to prepare for cross-examination, and approved the use of a court-appointed investigator for this purpose. (Tr. 84). When these witnesses testified at trial, however, the defense did not

7/ Discovery of witness names is governed by Crim. R. 16(B)(1)(e), which provides:

> "Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. Where a motion for discovery of the names and addresses of witnesses has been made by a defendant, the prosecuting attorney may move the court to perpetuate the testimony of such witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state."

request a continuance, but proceeded directly to cross-examine them.

The two witnesses whose names were withheld at the discovery state were Michael Anderson and Novarro Brooks, fellow inmates of appellant at the county jail. They testified that appellant had confessed to them that he had committed the crime. Their testimony was critical to the state's case, because the remainder of the state's evidence was circumstantial.

Appellant cites three cases in support of his contention that the trial court erred in granting the state's request for a protective order. United States v. Opager (C.A. 5 1979), 589 F.2d 799; United States v. Hernandez-Berceda (C.A. 9 1978), 572 F.2d 680; and United States v. Cavallaro (C.A. 2 1977), 553 F.2d 300. None of these cases is on point. In Opager, the Fifth Circuit Court of Appeals reversed a defendant's conviction because the state had disobeyed an order of the trial court, requiring it to disclose to the defendant the address of a named informant. Moreover, it was not alleged in that case that the witness would have been in danger had the disclosure been made; it was merely alleged that the witness did not "wish" to be interviewed by defense counsel. 589 F.2d, 804-806. In Hernandez-Berceda, the trial court's decision to refuse to order the state to disclose the identity of a confidential informant was affirmed by the Court of Appeals, on the ground that the informant's testimony would have been inculpatory, and not helpful to the defense. [8/] In Cavallaro, the Court of Appeals upheld a decision

8/ If knowledge of an informant's identity would be "relevant and helpful" to the defense, disclosure must be made. Roviaro v. United States (1957), 353 U.S. 53.

of a trial court, which forbade defense counsel from inquiring as to the rape victim's current address on cross-examination. In that case the defendants were free on bail, and the victim was in great fear.

As a general rule, the government may not conceal the whereabouts of a witness, in order to hinder the defendant's preparation for trial or his presentation of a defense. United States v. Herrao (C.A. 5 1981), 652 F.2d 591, 592; United States, ex rel. Almeida v. Baldi (C.A. 3 1952), 195 F.2d 815, cert. den. 345 U.S. 904 (1953). Where the government makes material witnesses wholly unavailable to the defense by deposing them before they can be interviewed by defense counsel, the defendant's right to the compulsory process of witnesses is violated. United States v. Arnijo-Martinez (C.A. 6 1982), 669 F.2d 1131.

Ohio courts have held that where the state withholds information in violation of Crim. R. 16, the defendant's conviction may be reversed on appeal, State v. Montgomery (1982), 3 Ohio App. 3d 280, but only where the prosecution's action was wilful or where the defendant was prejudiced by admission of the evidence without foreknowledge of it. State v. Parson (1983), 6 Ohio St. 3d 442.

Under subdivision (B)(1)(e) of Crim. R. 16, the identity of a witness may be withheld if the prosecution certifies to the court that the witness might thereby be subjected to "physical or substantial economic harm or coercion." It is not sufficient for the prosecutor to merely recite this certification, or to support this certification by statements made off the record. The reasons for suppressing the identity of a government witness must be placed on the record, so that the decision of the trial court may be

reviewed on appeal. State v. Owens (1975), 51 Ohio App. 2d 132, 147.

In the case at bar, the reasons for withholding the identity of two government witnesses were placed on the record. Provision was made to protect the appellant's discovery rights, by authorizing an indefinite continuance and the use of an investigator, following direct examination of each witness. It appears from defense counsel's failure to resort to either of these proffered devices, that the defense was not prejudiced by the protective order. 9/

The second assigned error is not well taken.

IV. VOIR DIRE

Assignments of Error Nos. 3, 4, and 5. 10/

9/ The record indicates that the appellant was aware that Anderson and Brooks were going to testify against him. Anderson stated that one week before trial, he spoke with appellant in a holding cell at the county jail:

> "'Shorty' [appellant] asked me was it true about me and 'Newt' [Brooks] saying something about his case, turning evidence against him on his case." (Tr. 1674).

10/ Assignment of Error No. 3:

> The trial court committed reversible error in its conduct of the voir dire proceedings, thus, denying appellant his constitutional rights guaranteed him by the sixth and fourteenth amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution.

Assignment of Error No. 4:

> The prosecution asked improper 'death qualifying' questions of the veniremen in violation of both the Federal Constitution, as interpreted in Witherspoon, and R.C. 2945.25(C).

Assignment of Error No. 5:

> The conduct of the 'death qualifying' aspect of the voir dire proceeding violated appellant's

Appellant contends in assignments of error 3, 4, and 5 that several errors were committed during voir dire. Specifically, appellant claims the following constituted prejudicial error:

(1) The dismissal of five potential jurors (Jim Melenik, Dr. Larson, Mrs. Winiski; Mrs. Olga Mussengo, and Mrs. Carrie Owens);

(2) Reference by the court and the prosecutor, during voir dire, to the jurors' views on imposition of the death penalty in "this case", rather than "a [hypothetical] case";

(3) The prosecutor's statement during voir dire that the jury may have to "look him [the accused] in the eye" when recommending the death penalty;

(4) The exclusion of "death qualified" jurors [i.e., jurors who will consider imposition of the death penalty] from the guilt determining phase of the proceeding.

Each of these four issues is separately discussed below.

(1) Exclusion of five jurors from panel.

Jurors Melenik, Larson, and Winiski, each expressed an inability to follow the instructions of the court, in imposing the death 11/ 12/ 13/

11/ Melenik stated, at p. 181 of the record: "I couldn't follow the instructions of the Court, if they were to impose the death sentence."

12/ Larson stated: "I would try to follow the law, but it still might be impossible for me."

13/ The prosecutor put the following question to Mrs. Winiski:

> "MR. SAMMON: Are you telling us, ma'am, in spite of the fact that you said your conscience is opposed to capital punishment, that you can fairly listen to the evidence and bring back a sentence, if warranted, which would send this man to the electric chair? Are you saying that that is what you could do?
>
> "MRS. WINISKI: I don't think I could." (Tr. 821).

penalty. They were therefore properly excluded under Witherspoon v. Illinois (1968), 391 U.S. 510, and Adams v. Texas (1980), 448 U.S. 38.

Mrs. Mussengo was excused for cause because she stated that she could not concentrate on the case. (Tr. 609-610). She looked after her 83 year old mother; Mrs. Mussengo cleaned her mother's house and shopped for her. (Tr. 616). Her mother had recently taken ill, and was at home, awaiting the results of x-rays of her legs. (Tr. 603, 615). When defense counsel objected to Mrs. Mussengo's dismissal, and asked whether she could concentrate on the case, she responded, "I really don't know, you know. I would see what happened." (Tr. 617).

Mrs. Owens was excused because the prospect of serving as juror had aggravated a nervous condition. She experienced stomach problems, loss of sleep, and shaking. (Tr. 1114-1115). The defense did not object to her dismissal.

Two other witnesses were excused for personal reasons. One had vacation plans (Tr. 942), and one, like Mrs. Mussengo, was caring for an elderly mother. (Tr. 944). There was no pattern of excusing only jurors who were opposed to the death penalty.

No error was committed in the excusal of jurors.

(2) and (3) Voir Dire with reference to "this" case.

No error is committed by court or prosecutor in mentioning to jurors that they may be called upon to determine whether to impose the death penalty, in the particular case before the court. Obviously, to conduct an appropriate voir dire in any case, the jury array must be informed of the nature of the case they will be empaneled to consider upon trial. Reference to imposition of the

death penalty in "this" case, rather than "a" case, does no more than state the obvious: that the death penalty is a possible legal issue in the case before the court.

The prosecutor's statement to the jury graphically, but properly, makes this point. The jurors are not assembled to debate the efficacy or the morality of the death penalty in general; they are to apply the law to the facts of this case, and possibly, to recommend whether the defendant's life should be terminated pursuant to law. Jurors who cannot follow the law in this matter must be excused from cause, under Witherspoon, supra.

(6) Appellant contends that the Witherspoon test is unconstitutional, in that jurors opposed to the death penalty are excused from the guilt-determining phase as well as the sentencing phase of the proceedings. He concludes that he was thus denied the right to trial by a representative jury. Taylor v. Louisiana (1975), 419 U.S. 522; Duren v. Missouri (1979), 439 U.S. 357. This contention was rejected in Lockett v. Ohio (1978), 438 U.S. 586, 596-597, wherein it was stated:

> "Nor was there any violation of the principles of Taylor v. Louisiana, supra. In Taylor, the Court invalidated a jury selection system that operated to exclude a 'grossly disproportionate', 419 U.S., at 525, number of women from jury service thereby depriving the petitioner of a jury chosen from a 'fair cross-section' of the community, id., at 530. Nothing in Taylor, however, suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge." (Emphasis added).

The appellant's third, fourth, and fifth assigned errors are not well taken.

V. EVIDENTIARY MATTERS

Assignments of Error Nos. 6 and 7.[14]

In assignments of error 6 and 7 appellant argues that the trial court committed reversible error in the admission of photographs into evidence.

Defense counsel did not object to the admission of photographs taken at the coroner's office prior to autopsy, but did object to the fact that the jury was permitted to see them immediately following the coroner's testimony. (Tr. 1386-1387). The mode and order of the presentation of evidence are committed to the sound discretion of the trial court. Evid. R. 611(A).[15] No abuse of discretion occurred in this instance.

Defense counsel also had no objection to any particular picture taken in the interior of the decedent's home, showing the crime scene. The defense only objected to the "overwhelming number" of

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[14] Assignment of Error No. 6:

> The trial court committed reversible error by permitting the jury to view photographs taken of the victim by the coroner's office immediately following the deputy coroner's testimony.

Assignment of Error No. 7:

> The trial court committed reversible error by admitting into evidence over appellant's objection several photographs of the victim and several envelopes found outside her home.

[15] Evid. R. 611(A) provides:

> "(A) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harass-

ment or undue embarrassment."

such pictures. (Tr. 1735, 1741). The court excluded state's exhibit 6, and admitted the remaining photographs, fourteen in number. Of these, three are various views of the victim's body, showing it in relation to the furniture and the door. The eleven remaining pictures show bloodstains in the bedroom, loose change on the floor, the victim's dog, and other relevant items in the victim's home. There was no error in the admission of these photographs into evidence.

Finally, the appellant contends that it was error to admit the National City Bank envelopes into evidence. Patrolman McCreary, the first police officer on the scene, testified that he found these envelopes in a trail leading from the victim's house:

> "Q. What was the pattern of these envelopes that were Exhibits 31 through 34, 35, the National City Bank envelopes?
>
> "A. It was leading to the front porch going into a northern direction on East 127th Street.
>
> "Q. And did they stop at 127th?
>
> "A. They stopped there at the corner."
> (Tr. 1410).

The victim maintained accounts at National City Bank. (State's Exhibits 36, 37, 38). The victim's daughter-in-law, Gertrude Swiger, regularly accompanied the victim to the National City Bank, but she did not recognize the bank envelopes found outside her residence following the murder. (Tr. 1550). Appellant contends that the prejudicial impact of the envelopes outweigh their probative value, and that they should have been excluded pursuant to Evid. R. 403[16]

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[16] Evid. R. 403(A) provides:

> "(A) Exclusion Mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of

While the probative value of this evidence is only moderate, the danger of unfair prejudice is even less. That the motive for this crime was robbery is supported by the fact that money was found on the floor in a trail leading out the door, and by the fact that the victim's wallet was missing. There was no error in the admission of all of these items of evidence. The sixth and seventh assignments of errors are not well taken.

VI. SUFFICIENCY OF THE EVIDENCE

Assignments of Error Nos. 8 and 11. [17]

In these assignments, appellant does not contend that the verdict was against the manifest weight of the evidence, only that it was not sufficient to support the verdict of the jury. In determining the sufficiency of the evidence, the evidence is construed most strongly in favor of the state, and the verdict of the jury will be affirmed unless a reasonable juror would necessarily entertain a reasonable doubt as to the guilt of the accused. Crim. R. 29; State v. Bridgeman (1978), 55 Ohio St. 2d 261.

The evidence is not wholly circumstantial. On at least two occasions, the accused allegedly admitted to two cell mates that he killed the victim, and recited details of the crime such as how she was wounded and killed, and how he had rolled her body over with

17/ Assignment of Error No. 8:

> The trial court committed reversible error in denying appellant's motion for acquittal made at the close of both appellee's and appellant's case.

Assignment of Error No. 11:

> Appellant was denied due process of law as his conviction was based upon insufficient evidence.

his shoe. If the state's witnesses are believed, there is no reasonable doubt that the appellant is guilty.

The eighth and twelfth assignments of error are not well taken.

VII. CLOSING ARGUMENT OF PROSECUTOR

Assignments of Error Nos. 9 and 10. [18]

In his 9th and 10th assignments of error, appellant contends that the following statements made by the prosecutor during closing argument were unfairly prejudicial:

> "And then we have the omission [sic, admission] he made to Michael Anderson and to Novarro Brooks. Ladies and gentlemen of the Jury, regardless of what you may have thought about both Michael Anderson and Novarro Brooks, I didn't think that I would ever have the occasion to sit in the Courtroom when a fellow member of the Bar got up and refer to people who were trying to do their civic duties as stool pigeons.
>
> "Here they come in and testify to you what this man told them. And, again, ladies and gentlemen of the Jury, they tell you they were lying, but they offer no evidence to rebut that.
>
> "MR. OLIVER: Objection.
>
> "THE COURT: The objection is overruled.
>
> "MR. SAMMON: They could have brought somebody through those doors or through these doors, or behind this chalk board (indicating), if that was the case, and put them on the stand and say, 'No,

18/ Assignment of Error No. 9:

> Remarks of the prosecution made during its closing argument and concerning appellant's failure to testify contravened his constitutional rights against compulsory self-incrimination.

Assignment of Error No. 10:

> The prosecution during its closing argument acted to deny appellant his constitutional right to a fair trial by inducing the jury to base its decision upon

Novatte Brooks and Michael Anderson were lying. It never took place."

"MR. LAMBROS: Objection.

"MR. SAMMON: There is absolutely no evidence to contradict what they testified to, ladies and gentlemen.

"THE COURT: The objection is overruled.

"MR. SAMMON: No evidence whatsoever." (Tr. 1874-1875).

"And notice, ladies and gentlemen of the Jury, in State's Exhibit 4, at least one good thing came out of this is the fact that Mrs. Chmielewski had her Bible open.

"And I'm just wondering if you gave her an opportunity to say her prayers before you shot her?" (Tr. 1878).

"Now ladies and gentlemen of the Jury, looking at this picture of State's Exhibit 4, I am reminded that the crime that was committed here was not only against the laws of society, but it was also against the laws of God. And now some people, ladies and gentlemen, have the benefit, when they reach an old age, of dying in bed with their relatives holding their hand and comforting them. This woman, who was such a good woman, was denied that privilege and right. And the last thing she saw was this Defendant sticking a gun in her face and killing her.

"Ladies and gentlemen of the Jury, the standards of this community are dictated by jurors such as you who listen to evidence and see evidence and reach fair decisions in cases such as these.

"I ask you, ladies and gentlemen, to maintain the standards of this community." (Tr. 1881-1882).

The appellant contends that the first statement quoted above is a comment upon the silence of the accused, and that the latter two statements are an appeal to the passion and prejudice of the jury.

Comment upon the silence of the accused infringes upon the defendant's Fifth Amendment right to remain silent. Griffin v. California (1965), 380 U.S. 609. It was held to be permissible for the prosecutor to state, "I ask you to not only listen to my side, but to listen also to the defense's side", in a case where the defense presented no evidence. State v. Cooper (1977), 52 Ohio St. 2d 163, 173. This remark was construed as a reference to the closing argument of defense counsel, not to the lack of evidence for the defense.

The Ohio Supreme Court has narrowly interpreted Griffin v. California as prohibiting only direct comment upon the silence of the accused, and not comment upon the failure of the defendant to call witnesses in his own behalf:

> "In proposition of law No. 15, appellant asserts that the state's closing argument improperly implied that the burden of proof had shifted to the defense to prove the accused innocent. The record reveals that the state merely pointed out the failure, on the part of defense counsel, to subpoena witnesses to prove its theory of the case. Because appellant had the burden of going forward with evidence to rebut the adverse inferences raised by the state, the comment by the prosecutor was not improper. See 21 Ohio Jurisprudence 2d 166, Evidence, Section 157. [Appellant also claims that this line of argument violates his right to remain silent and amounted to a comment by the prosecution on his failure to testify. Appellant misconstrues the law enunciated in Griffin v. California (1965), 380 U.S. 609. We understand the Griffin holding to prohibit only direct comment upon the accused's failure to testify. Thus, the prosecution is not prevented from commenting upon the failure, on the part of the defense, to offer any other evidence in support of its case. Therefore, this proposition of law is without merit."
> State v. Lane (1976), 49 Ohio St. 2d 77, 80 (DeFebrette, J.); followed in State v. Woods (Cuy. Cty. Ct. App. 1981), 8 Ohio App. 3d 99, 99 (Markus, J.).

Moreover, this Court is not convinced by appellant's claim that comments by prosecutor during closing arguments "incited the jury's passion and prejudice." We do not find the aforementioned comments to be so inflammatory as to arouse the passion and prejudice of the jury against appellant. State v. Woodard (1966), 6 Ohio St. 2d 14; State v. Kiraly (1977), 56 Ohio App. 2d 37, 51.

VIII. INSTRUCTIONS TO JURY

Assignment of Error No. 11.

In Assignment of Error No. 11 appellant contends that the trial court's erroneous jury instructions resulted in the denial of appellant's due process right to a fair trial.

The trial court instructed the jury that it might find the appellant guilty only if the state had established his guilt "beyond a reasonable doubt." The Ohio Criminal Code contains definitions of "reasonable doubt" and "beyond a reasonable doubt", and requires trial courts to include these definitions in their charge to the jury. See Revised Code Section 2901.05. The trial court in the case at bar read these definitions to the jury.

Appellant contends that despite the trial court's compliance with the applicable statute, reversible error was committed. Appellant claims that the court ought to have instructed the jury that in capital cases the state's burden of proof should be guilt "beyond any doubt", he claims that the statutory definition of "beyond a reasonable doubt" is in fact constitutionally deficient in that the definition states a "clear and convincing evidence" standard, and he claims that the court ought to have submitted a special verdict form to the jury, inquiring whether the appellant was proven to have had the specific intent of killing the victim.

None of these proposed instructions were submitted to the trial court, nor did the defense object to the charge of the court. Therefore, pursuant to Crim. R. 30(A), the appellant may not assign as error the giving or the failure to give any instructions.

Nor can these matters be considered "plain error" pursuant to Crim. R. 52(B), unless "but for the error, the outcome of the trial clearly would have been otherwise." State v. Underwood (1983), 3 Ohio St. 3d 12 (syllabus).

The charge to the jury was not erroneous. In State v. Maborny (1978), 54 Ohio St. 2d 195, a capital case, the Ohio Supreme Court found the statutory definition of reasonable doubt to be constitutional.[19/] Neither proof "beyond any doubt", nor a more stringent

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19/ The court stated, at pp. 202-203 of its opinion:

> "[We] are constrained to reject appellant's assertion that the mandated definition of 'reasonable doubt' is constitutionally deficient.
>
> * * *
>
> "The General Assembly has attempted, in R.C. 2901.05 and the definition of 'reasonable doubt' therein, to provide not only a degree of consistency as to the meaning of the term throughout the courts of this state, but also to have a definition comprehensible to all the members of the jury and not merely those trained in the subtle nuance of legalese. Considering the inherent difficulty in defining this abstract concept of reasonable doubt, the similarity of the definition under consideration with that in Holland, supra, and the beneficial aspects of the legislative mandated definition, we find that the General Assembly has pronounced a rational definition of 'reasonable doubt' which, when taken as a whole, correctly conveyed the concept of 'reasonable doubt' to the jury. The fourth proposition of law is overruled."

definition of proof "beyond a reasonable doubt", was found to be constitutionally required. 20/

R.C. 2903.01(D), effective October 19, 1981, provides:

> "(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt."

Appellant contends that this statutory language mandates the court to require the jury to return a special verdict, indicating

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20/ The Nabozny court did not expressly consider a "beyond any doubt" standard of guilt. However, by finding the statutory definition of reasonable doubt constitutionally permissible in a capital case, it impliedly rejected the proposed higher standard of proof.

whether the defendant specifically intended to cause the victim's death. This statute anticipated Enmund v. Florida (1982), 458 U.S. 782, wherein the United States Supreme Court barred the imposition of the death penalty for what the common law called "felony-murder." 21/ The court held that mere participation in a robbery which results in a murder unintended by the accused, does not justify the death penalty. 22/ But the Supreme Court in Enmund did not require the trial court to submit an interrogatory to the jury on the issue of the defendant's intent. It merely required that intent to kill be charged and proven. This is all that R.C. 2903.01 requires.

Had the Legislature desired, it could have required a special finding of intent as part of the verdict. As this Court of Appeals pointed out in State v. Jenkins (Feb. 24, 1984), Unreported Case No. 45231, special findings are statutorily required to determine the value of property subjected to arson, vandalism, or theft. And, of course, R.C. 2929.03(B) requires the jury to make a special finding as to the age of the offender and whether the offender is guilty of each of the specifications of aggravated murder.

The Legislature did not choose to require a special finding as to the element of specific intent. Instead, "intent" is subsumed within the general verdict, as are the other elements of murder. A special finding on the issue of intent is neither constitutionally nor statutorily required.

21/ Felony-murder occurs when a death is proximately caused by the commission of a felony. In Enmund, it was held that the death penalty may not be imposed upon any co-conspirator unless that person is shown to have intended the victim's death.

22/ At page 797 of its opinion, the court stated: "We have the abiding conviction that the death penalty, which is 'unique in its severity and irrevocability', is an excessive sanction for one who

Far from being "plain error", this Court is persuaded the instructions of the trial court were correct.

The eleventh assigned error is not well taken.

IX. PROSECUTION'S CLOSING ARGUMENT IN MITIGATION HEARING

Assignment of Error No. 13.

In his 13th assignment of error, appellant claims that the following remarks of the prosecutor, during summation in the mitigation phase of this trial, were prejudicial error:

> "The issue for you ladies and gentlemen to decide in this particular case is an issue which has nothing to do with punishment in the sense that you must find whether or not the aggravating circumstances, that is the fact that Mrs. Chmielewski was killed while this defendant was committing aggravated robbery outweigh any mitigating factors. That is what your finding must be.... The Court will instruct you on your proper role, ladies and gentlemen, and you must find -- if you find the aggravating circumstances outweighs[sic] the mitigating factors, you must make a recommendation to the Court, but it's the Court, ladies and gentlemen, and I anticipate he will tell you that, that will make the ultimate decision in this case." (M.T. 57-58).

Appellant's apparent point is that the jury should not be informed that their role is merely to determine whether the specifications (aggravating circumstances) outweigh the mitigating factors proven by the defense, and that they merely "recommend" the death penalty. But this is, indisputably, their role. See R.C. 2929.03(D)(2). The judge may choose to ignore the jury's recommendation of death, and impose a lesser sentence, if it does not find by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors. R.C. 2929.03(D)(2). The prosecutor did not mislead the jury, nor did he state or imply that the jury should recommend the death penalty so that the judge could determine whether or not to impose it.

The thirteenth assigned error is not well taken.

X. INSTRUCTIONS TO JURY DURING MITIGATION HEARING

Assignment of Error No. 14.

The appellant's fourteenth assigned error asserts that the jury need not return a unanimous verdict at a mitigation hearing if their recommendation is not to impose the death penalty. He finds support for this proposition in R.C. 2929.03(D)(2), wherein it expressly states that a unanimous verdict is required for recommendation of the death penalty, but is silent as to the number of votes necessary for imposition of a lesser punishment. Crim. R. 31(A) fills this gap, by requiring all verdicts to be unanimous. Accord, State v. Jenkins, supra, slip op. at 55-56.

Appellant also restates his challenge to the statutorily defined standard of "proof beyond a reasonable doubt." This challenge is discussed, and overruled, in out disposition of the eleventh assignment of error.

XI. EVIDENCE AT MITIGATION HEARING

Assignment of Error No. 15.[23]

Appellant contends that R.C. 2929.03(D)(1) abridges his constitutional and statutory rights.

R.C. 2929.03(D)(1)[24] provides that, at the option of the defense, a presentence investigation and a mental examination shall be performed, and the reports of these shall be submitted to the jury.

23/ Assignment of Error No. 15:

> R.C. 2929.03(D)(1), which permits the submission of a defendant's pre-sentence investigation and mental examination reports to the trier of fact abridges a defendant's constitutional and statutory rights.

Pursuant to R.C. 2947.06,[25] the defense may cross-examine the psychiatrist or psychologist who conducted the mental examination. No provision is made for examination of officials from the probation department who prepared the presentence investigation report.

It should be specifically noted that appellant requested the preparation of the presentence investigation reports. (M.T. 26/6).

25/ R.C. 2947.06 provides:

> "The trial court may hear testimony of mitigation of a sentence at the term of conviction or plea, or at the next term. The prosecuting attorney may offer testimony on behalf of the state, to give the court a true understanding of the case. The court shall determine whether sentence ought immediately to be imposed or the defendant placed on probation. The court of its own motion may direct the department of probation of the county wherein the defendant resides, or its own regular probation officer, to make such inquiries and reports as the court requires concerning the defendant, and such reports shall be confidential and need not be furnished to the defendant or his counsel or the prosecuting attorney unless the court, in its discretion, so orders.
>
> "The court may appoint not more than two psychologists or psychiatrists who shall make such reports concerning the defendant as the court requires for the purpose of determining the disposition of the case. Each such psychologist or psychiatrist shall receive a fee to be fixed by the court and taxed in the costs of the case. Such reports shall be made in writing, in open court, in the presence of the defendant, except in misdemeanor cases in which sentence may be pronounced in the absence of the defendant. A copy of each such report of a psychologist or psychiatrist may be furnished to the defendant, if present, who may examine the persons making the same, under oath, as to any matter or thing contained therein."

Crim. R. 32.2 supplements R.C. 2947.06, but does not contain any provisions concerning cross-examination of preparers of the report. Accordingly, those statutory provisions are still in force. Furthermore, R.C. 2929.03 specifically incorporates by reference R.C. 2947.06, not Crim. R. 32.2.

This investigation revealed that the appellant had a long criminal history, and intended to return to live with his cousin Kevin Samuels across the street from the murder site. The report on appellant's mental examination, prepared by Jitendra Cupala, M.D., contained even more damning information. Appellant essentially admitted to Dr. Cupala[27] that he committed the murder, and it was the doctor's opinion that appellant was not suffering from a mental disease or defect on the day of the crime, but that he merely had an "antisocial personality." Both reports were admitted into evidence at the mitigation hearing, over the objection of defense counsel.

27/ A portion of Dr. Cupala's report, relating appellant's description of the crime, is as follows:

> "He then stated that she came back and sat down and they continued to talk. After a while, he wanted to go to the bathroom and at the time, the lady threw a rubber mouse for her dog Tinker to fetch. He caught the mouse and threw it back and went to the bathroom, then came back and sat on the couch and stated that he was feeling all right and felt calmed down. He then saw some car lights flashing through the window coming from the way of Kevin's house and the lady went out, opened the door and he went behind her. He stated that he saw the car going down the street and she started talking about a neighbor called Andy. The defendant then stated that he remembers pulling the dog out of his coat and after which he saw the victim fall and hit the table. He does not remember how the dog got into his coat and he said the dog bit him while he was trying to take the dog out. When he saw the lady fall, he went to the phone and dailed '0' and at that time he saw that he had a gun in his hand. He looked across the room and saw the victim on the floor and he ran out of the house to Kevin's house and since the door was locked, he ran to the back side and he thought that the people in the house had left. He then went to E. 127 Street towards a beverage store past a gas station, and could not find his friends and went back to Kevin's house. He then went to a rapid station and started running down the tracks and jumped on a rapid train, went downtown to the bus

Appellant contends on appeal that he was denied his constitutional right to confront his accusers,[28] and that the written reports were inadmissible hearsay.[29]

The Ohio Rules of Evidence do not apply in sentencing proceedings. Evid. R. 101(C)(3).[30] Furthermore, due process is certainly satisfied where a defendant is given the opportunity to correct any erroneous information in a presentence report. Gregg v. Georgia (1976), 428 U.S. 153. The appellant had that opportunity during the mitigation hearing. Finally, the appellant had the right to cross-examine Dr. Cupala, and failed to exercise this right; and he does not contend that the presentence report prepared by the probation department contained any factual mistakes. There was no error and no prejudice to the appellant. However, assuming arguendo that there was error, any error was waived because the reports were prepared at the request of appellant.

The fifteenth assignment of error is not well taken.

XII. WEIGHT OF EVIDENCE AT MITIGATION HEARING

Assignment of Error No. 16.

Appellant contends in this assignment of error that the trial court committed reversible error by imposing the death penalty.

The jury and the trial court found that the appellant was guilty of one aggravating circumstance: this murder was performed

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28/ The Sixth Amendment to the Constitution of the United States provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

29/ Evid. R. 801, 802.

30/ Evid. R. 101(C)(3) provides, in relevant part:

> "These rules (other than with respect to privileges) do not apply in the following situa-

in the course of a robbery.[31] The mitigating factors that may be considered by the jury are prescribed by statute, and include the following:

> "(1) Whether the victim of the offense induced or facilitated it;
>
> "(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
>
> "(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;
>
> "(4) The youth of the offender;
>
> "(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;
>
> "(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;
>
> "(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death."

There was no evidence that the victim induced or facilitated this crime, that appellant acted under duress, coercion, or provo-

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31/ This aggravating circumstance is statutorily defined at R.C. 2929.04(A)(7), which states:

> "The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggra-

cation, that appellant suffered from "diminished capacity", or that appellant was not the principal offender. The trial court found that the appellant's age was not a mitigating factor in this case, and this Court of Appeals agrees that the relative youth of this offender would tend to mitigate his guilt only insofar as he might have acted under the influence of other persons, a situation which does not exist in this case.

The only other purported mitigating factor presented by the defense was that the appellant has been at odds with his family and society since the age of eight. The single positive character witness called by the defense at the mitigation hearing was unaware of his numerous adjudications for delinquency and convictions as an adult, and of his lengthy incarcerations in reform schools, detention centers, and prisons.

The relevant statute indicates that lack of a criminal or juvenile record is a mitigating factor, not the existence of one. R.C. 2929.04(B)(5). This Court is persuaded that the Legislature intended to allow, as evidence of mitigation, the fact that the offender had led a relatively blameless life. Surely a person who has been a law-abiding citizen until the date of the offense in question should receive more lenient treatment than a habitual criminal.

The appellant's evidence in mitigation was that he came from a broken home; that he loved his mother more than she loved him; and that he undertook a life of crime to compensate for the lack of love he felt. Though these facts, and others such as poverty, might explain his behavior, they do not mitigate it. A few persons become cruel and violent, when they are raised in such circumstances.

Others become more sensitive, and still others become motivated to succeed. For an individual to blame his parents for his own character faults is a futile effort to escape personal responsibility. Whom shall his parents blame for their being less than perfect parents?

In a free society such as America, every person including the appellant must assume responsibility for his own shortcomings. In the absence of factors such as duress, provocation, diminished capacity, or the others listed in R.C. 2929.04(B), this Court is persuaded, beyond a reasonable doubt, that the aggravating circumstances found to exist by the jury and the trial court, outweighs the mitigating factors.

The sixteenth assignment of error is not well taken.

XIII. VALIDITY OF THE DEATH PENALTY, ON ITS FACE AND AS APPLIED Assignment of Error Nos. 17 and 18. 32/

In assignments of error nos. 17 and 18, appellant reminds this Court of Appeals that it is statutorily required to determine whether the sentence is "excessive or disproportionate to the sentence imposed in similar cases." R.C. 2929.05(A). The "proportionality" of the death penalty for a purposeful murder cannot be doubted.

32/ Assignment of Error No. 17:

> The trial court's imposition of the death penalty upon appellant violated both his constitutional and statutory rights as the sentence was excessive and disproportionate to those imposed in other cases.

Assignment of Error No. 18:

> Ohio's death penalty statute, as embodied in R.C. 2903.01, 2929.021, 2929.022, 2929.023, 2929.024, and 2929.025, is unconstitutional both on its face and as it was applied to appellant in

Cf. Enmund v. Florida, supra, wherein the death penalty for felony murder was upheld, with respect to cases where the accused intended to kill the victim, and is indeed imposed in the majority of state jurisdictions.

Though an explicit proportionality survey may no longer be constitutionally required,[33/] it does appear to be mandated by statute. R.C. 2929.05(A), quoted supra.

Ohio Courts of Appeals have reviewed five cases in which the death penalty was imposed,[34/] since passage of the most recent death penalty act. In determining the proportionality of the punishment to the crime in question, we adhere to the position of this Court in State v. Jenkins (Cuy. Cty. Ct. App., Feb. 24, 1984), Case No. 45231, and review the facts of only those cases disposed of by the 8th Appellate District.

In State v. Spisak (Cuy. Cty. Ct. App., July 19, 1984), Case Nos. 47458, and 47459, the Cuyahoga County Court of Appeals affirmed the conviction and sentence of Frank Spisak, and avowed Nazi, who had admittedly killed three persons, seriously injured another, and shot at a fifth, because of his racial and political opinions. All of the victims were strangers to him.

33/ See Pulley v. Harris (1984), 104 S.Ct. 871.

34/ As of September 30, 1984 Ohio Courts of Appeals have reviewed the following five cases concerned with capital punishment statutes:

(1) State v. Robert Shields (Cuy. Cty. Ct. App., Jan. 26, 1984), Case No. 46012.

(2) State v. Donald Lee Maurer (Stark Cty. App. Feb. 13, 1984), Case No. 6196.

(3) State v. Leonard Jenkins (Cuy. Cty. Ct. App., Feb. 24, 1984), Case No. 45231.

(4) State v. Billy Rogers (Lucas Cty. March 30, 1984), Case No. L-82-[illegible].

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In State v. Jenkins (February 24, 1984), Case No. 45231, this Court affirmed the sentence of death for a defendant who deliberately shot and killed a police officer while fleeing from a bank robbery. He was captured at the scene.

In State v. Robert Shields (Cuy. Cty. Ct. App., Jan. 26, 1984), Case No. 46012, this Court affirmed the life sentence of the defendant who with a companion entered an apartment where a Mrs. Beverly Brooks was operating an "after hours" liquor sales establishment. Defendant forced five patrons at gunpoint into a room of the apartment, forced them to lie on the floor, and robbed them. Mrs. Brooks observed defendant point a handgun at one victim, who was lying face down on the floor, and without provocation, fired a single shot into the back of his head killing him.

The victim in the case at bar, like the victims of Spisak and Shields were defenseless in the face of an unexpected armed attack. The penalty imposed in the case at bar is not disproportionate to the offense, nor are the facts of the case less egregious than the facts in State v. Spisak, supra, or State v. Shields, supra.

The appellant also challenges the constitutionality of the death penalty in general, for several reasons. According to the appellant, it is cruel and unusual punishment, it does not deter crime, and is it not the least onerous means of protecting society from convicted criminals. It is, and will be, arbitrarily and disproportionately imposed against blacks, Cuyahoga County residents, and males. Finally, it leaves too much discretion in the hands of prosecutors, who may or may not indict an accused for specifications. He also perceives deficiencies in the specific statute itself. "Felony murder" contains its own aggravating specification

while premeditated murder does not. The statute allegedly does not specify how mitigating factors are to be proven and weighed. And, finally, according to appellant, the statute ought to require the aggravating circumstances to "substantially" outweigh the mitigating factors, instead of merely to "outweigh" them, which the defense construes as a preponderance standard.

Addressing the statutory questions first, we note that the fact that a purposeful killing in the commission of a felony is automatically a capital offense, while premeditated murder (without more) is not, is a legislative decision, and is not irrational or arbitrary. Contrary to appellant's assertions, the Ohio Revised Code does assign a burden of production and a burden of persuasion at the mitigation hearing. The defendant bears the burden of producing evidence as to the existence of mitigating factors, and the prosecution bears the burden of persuasion, beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors. R.C. 2929.03(D)(1). 35/

The present Ohio death penalty statute appears to conform to the guidelines established by the United States Supreme Court in Gregg v. Georgia (1976), 428 U.S. 153; Proffitt v. Florida (1976), 428 U.S. 242; Jurek v. Texas (1976), 428 U.S. 262; Woodsen v. North Carolina

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35/ R.C. 2929.03(D)(1) provides in relevant part:

> "The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death."

(1976), 428 U.S. 280; Roberts v. Louisiana (1976), 428 U.S. 325. The Supreme Court has rejected Justice Brennan's position that the death penalty is inherently cruel and unusual, or that it is necessarily arbitrarily applied. Finally, the role of prosecutorial discretion is present in every criminal case, nor can it be controlled except by vesting discretion is another public official or agency. The Ohio death penalty statute includes those safeguards mandated by the Supreme Court to require careful consideration and weighing of the aggravating circumstances and mitigating factors of each case.

The seventeenth and eighteenth assignments of error are not well taken.

Accordingly, the judgment of the trial court is affirmed.

APPENDIX

R.C. 2929.03(D)(1) provides, in relevant part:

"When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division."

TO COUNSEL FOR ALL PARTIES

COSTS TAXED.

It is ordered that appellee(s) recover of appellant(s) ____its____ costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the _____ COMMON PLEAS _____ Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

MARKUS, P.J.

ANN McMANAMON, J., CONCUR

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Leo A. Jackson

JUDGE

LEO A. JACKSON

JOURNALIZED NOV - 5 1984

GERALD E. FUERST, Clerk of Courts

By _____ Deputy

N.B. This entry is made pursuant to the third sentence of Rule 22 (D), Ohio Rules of Appellate Procedure. Time to announcement of decision, see Rule 26(A). Ten (10) days from the date of this [illegible]

2.

STATE OF OHIO)
(SS:
COUNTY OF CUYAHOGA)

IN THE COURT OF COMMON PLEAS
CRIMINAL BRANCH

CASE NO. CR-179814

STATE OF OHIO,
Plaintiff,
vs.
LEWIS WILLIAMS, JR.,
Defendant.

OPINION OF THE TRIAL JUDGE
IN CAPITAL CASE

ooOoo

James D. Sweeney, J.:

The trial court in the above case, in accordance with Ohio Revised Code Section 2929.03(F), hereby files its separate opinion concurrent with the imposition of the sentence of death.

The case originated with the filing of an indictment on February 1, 1983, under Case No. CR-179814. As indicted, the defendant was charged with one count of Robbery, Ohio Revised Code Section 2911.02; one count of Aggravated Burglary, Ohio Revised Code Section 2911.11; one count of Theft, Ohio Revised Code Section 2913.02; one count of Aggravated Murder with specifications, Ohio Revised Code Section 2903.01 and one count of Aggravated Robbery, Ohio Revised Code Section 2911.01. The first three counts of the indictment were severed on defendant's motion and remain pending. On counts four and five, Aggravated Murder with specifications and Aggravated Robbery, trial was commenced on September 18, 1983. On October 7, 1983, at the conclusion of the guilt-determination phase of the proceedings, the jury found the defendant, Lewis Williams, Jr., guilty of Aggravated Murder and guilty of two specifications to-wit: Specification one - murder in the perpetration of Aggravated Robbery, and Specification two - a firearm specification pursuant to Ohio Revised Code Section 2929.71. The jury also found the defendant guilty of Aggravated Robbery.

On October 13, 1983, the sentencing phase of the trial was commenced. The defendant presented testimony from three witnesses and took the stand himself to make an unsworn statement to the jury. On October 16, 1983, after more than 23 hours of deliberation, the jury returned a unanimous verdict finding beyond a reasonable doubt that the aggravating circumstance stated in Specification one of the Aggravated Murder charge outweighed any mitigating factors present in the case. The jury further recommended that the defendant be sentenced to death.

Thereupon, it fell to this court, pursuant to statute, i.e. Ohio Revised Code 2929.03(F) to state in separate opinion the court's specific findings as to the existence of any mitigating factors, and their weight relative to that of the aggravating circumstance of which the defendant was convicted.

The court hereby finds that the aggravating circumstance stated in Specification one to the charge of Aggravated Murder, was proved beyond a reasonable doubt. The court concurs with the jury's finding that the offense of Aggravated Murder was committed while the defendant was committing or attempting to commit Aggravated Robbery and that the defendant was the principal offender in the commission of the Aggravated Murder.

The court has weighed against said aggravating circumstance the nature and circumstances of the offense, the history, character and background of the offender and all other factors specified in Ohio Revised Code Section 2929.04(B), to-wit:

1) Whether the victim of the offense induced or facilitated it.

2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion or strong provocation.

3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law.

4) The youth of the offender.

5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications.

6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim.

7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

The court also gave consideration to all evidence presented in mitigation of the sentence of death in both phases of the trial of this case.

The circumstances surrounding the murder of Mrs. Cimielewski were not rebutted at any phase in the trial. In the course of robbing the elderly widow at gunpoint, this defendant beat her about the head and then shot her in the mouth from a distance of less than two feet.

In mitigation, and the defendant was given great latitude in the presentation of the mitigating factors, the defendant presented evidence and arguments essentially in three specific areas: First, that his upbringing and family life contributed to and accounted for a lifetime of criminal behavior culminated in this bizarre event; Second, that the defendant's age, 24 years old, is a mitigating factor pursuant to Ohio Revised Code Section 2929.04(B)(4); and third, that since a significant portion of the defendant's youth was spent in both juvenile and adult correctional institutions, that fact explains his lifelong virulent behavior.

The defendant presented testimony from Mrs. Olivia Packnett Smith, a friend of the family; from his sister, Debra Williams; and from his father, Lewis Williams, Sr. The testimony of these witnesses tended to establish that the defendant came from a broken home, his parents having separated early in the defendant's childhood. The testimony also established that the defendant is currently 24 years old, and has been at odds with society nearly all his life. There was testimony that the defendant spent much time away from home, both in juvenile institutions and while out living "on the streets".

In his unsworn statement to the jury, the defendant chose not to discuss the events of the night of January 20, 1983, but recounted his repeated run-ins with the law which began at age nine. The defendant's statement

tended to establish that he experienced frustration during his lengthy institutionalized periods, and that he felt that he was the least favorite of his parents' children. Nonetheless, his statement also tended to belie the fact that his parents were responsible for his antisocial conduct.

The evidence before the court indicated that the defendant had repeatedly given differing accounts of the events of January 20, 1983, depending upon whether the defendant was talking to police officers, psychiatrists, probation officers or fellow inmates. The court took these deflections into account in considering the defendant's general credibility. The court also notes the testimony of Lewis Williams, Sr., that the father was "always there when he was needed" by his children. Further, the court observes that the defendant's brother and sister testified at the trial, Mark Williams and Debra Williams. Each of them appeared to be honest, intelligent and on good terms with society, belying the defendant's arguments that his family life bears some responsibility for his behavior. Consequently, the court rejects the defendant's arguments that his family situation constitutes a mitigating factor in this case.

The defendant's age, to-wit: 24, was also presented by him as a mitigating factor.

Since he is over 18 and was at the time of the event, it is manifest the Ohio Revised Code Section 2929.04(B)(4) is not applicable.

The defendant has for six years been an adult under Ohio Law. As an adult he has certain rights and concomitant responsibilities. He is, therefore, responsible for all of his acts of free will and he is to be held accountable for his conduct.

With respect to the defendant's arguments that his life of lawlessness constitutes a mitigating factor in this case, the court makes the following findings:

Pursuant to Ohio Revised Code Section 2929.04(B)(5), the sentencing authority is specifically instructed by statute to consider as a mitigating factor, "The offender's lack of a significant history of prior criminal

THE STATE OF OHIO, APPELLEE, *v.* JENKINS, APPELLANT.

(Cite as: State v. Jenkins (1984), 15 Ohio St. 3d 164.)

Criminal law—Aggravated murder—Capital punishment—Constitutional.

(No. 84-478—Decided December 17, 1984.)

1. Ohio's statutory framework for imposition of capital punishment, as adopted by the General Assembly effective October 19, 1981, and in the context of the arguments raised herein, does not violate the Eighth and Fourteenth Amendments to the United States Constitution or any provision of the Ohio Constitution.

2. The failure to allify a jury prior to the guilt phase of a bifurcated capital case does not deny a capital defendant a trial by an impartial jury.

3. The instruction to the jury in the penalty phase of a capital prosecution that irrelevant consideration of bias, sympathy or prejudice is intended to ensure that the sentencing decision is based upon a consideration of the reviewable guidelines fixed by statute as opposed to the individual juror's personal biases or sympathies.

4. R.C. 2929.024 requires the court to provide an indigent defendant with expert assistance whenever, in the sound discretion of the court, the services are reasonably necessary for the proper representation of a defendant charged with aggravated murder. The factors to consider are (1) the value of the expert assistance to the defendant's proper representation at either the guilt or sentencing phase of an aggravated murder trial, and (2) the availability of alternative devices that would fulfill the same functions as the expert assistance sought.

5. In the penalty phase of a capital prosecution, where two or more aggravating circumstances arise from the same act or indivisible course of conduct and are thus duplicative, the duplicative aggravating circumstances will be merged for purposes of sentencing. Should this merging of aggravating circumstances take place upon appellate review of a death sentence, resentencing is not automatically required where the reviewing court independently determines that the remaining aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt and that the jury's consideration of duplicative aggravating circumstances in the penalty phase did not affect the verdict.

6. The jury in the penalty phase of a capital prosecution may be instructed that its recommendation to the court that the death penalty be imposed is not binding and that the final decision as to whether the death penalty shall be imposed rests with the court.

7. R.C. 2929.05 requires the review of the proportionality of death sentences regardless of whether counsel has provided evidence of disproportionality.

8. The standard of proof in a capital prosecution is proof beyond a reasonable doubt as defined in R.C. 2901.05 and not proof beyond all doubt.

9. A capital defendant is not entitled to a special verdict on the question of intent to kill at the guilt phase of a capital prosecution.

10. In returning a sentence of life imprisonment under R.C. 2929.03(D)(2), the jury's verdict must be unanimous.

11. Any decision to vary the order of proceedings in R.C. 2945.10 is within the sound discretion of the trial court, and any claim that the trial court erred in following the statutorily mandated order of proceedings must sustain a heavy burden to demonstrate the unfairness and prejudice of following that order. (*State v. Bayless*, 48 Ohio St. 2d 73 [2 O.O.3d 249], paragraph three of the syllabus, approved and followed.)

12. Ohio's statutory framework for imposition of capital punishment neither mandates nor precludes sequestration of the jury following its guilty verdict but prior to the penalty phase.

13. To prevail on a claim of prejudice due to an *ex parte* communication between judge and jury, the complaining party must first produce some evidence that a private contact, without full knowledge of the parties, occurred between the judge and jurors which involved substantive matters.

(No. 84-478—Decided December 17, 1984.)

APPEAL from the Court of Appeals for Cuyahoga County.

On the morning of October 21, 1981, Leonard Jenkins (hereafter referred to as appellant) and Lester Jordan entered a branch of National City Bank. Appellant, brandishing a handgun, directed the individuals in the bank to the rear of the building.

Appellant proceeded to disarm the bank's security guard by holding his gun to the guard's head. Now in possession of two guns, appellant advanced with Jordan to each teller. Appellant held each teller at gunpoint while Jordan removed the money from the drawers. While this action was taking place, bank personnel were able to activate silent alarms connected directly to the police department. Within minutes police were dispatched to the scene.

Officers John Myhand and Anthony Johnson were the first to arrive and parked their patrol car near the front of the bank. Myhand approached the bank on foot, with Johnson following several steps behind. Myhand reached the front door of the bank, peered inside, and viewed appellant near the door. Myhand observed that appellant was armed and told Johnson, "This is a good one, take cover." Immediately Myhand turned and began to run from the bank.

After Myhand had run a short way, he heard a single shot and then several more shots. In the exchange of gunfire, both appellant and

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convictions and delinquency adjudications." (Emphasis added). Consequently, the court finds that the defendant's copious criminal history offends the import of the aforementioned section of the Ohio Revised Code and thus is not a mitigating consideration. Nonetheless, the court is required and has taken the defendant's evidence and arguments into consideration as a necessary component of the history, background, and character of the defendant.

In addition to the proposed mitigating factors argued by the defendant, the court has also taken into consideration all of the testimony, evidence, arguments, the statement of the defendant and the reports of the presentence investigation and the psychiatric examination request by the defendant. In its deliberations, the court has considered all relevant mitigating factors apparent to it and has applied "the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in a capital case." Eddings v. Oklahoma, 455 U.S. 104 (1982).

Considering all of the above, the court finds little or no mitigation of the defendant's culpability in the brutal senseless robbery and slaying of Mrs. Leona Chmielewski. The court further finds beyond a reasonable doubt that the aggravating circumstance of which the defendant was convicted is sufficient to outweigh the evidence of mitigating factors presented herein.

The said determination was made by the court separately and distinct from that of the trial jury and is based upon the consideration of all relevant evidence and arguments in the adjudicative phase and the sentencing phase of the trial.

Respectfully submitted,

James D. Sweeney, Judge

November 16, 1983.

basis that where a right as fundamental as life is at stake, a state must employ the least restrictive means possible to achieve a compelling interest. Appellant contends that the societal interests at stake in the present case include deterrence and incapacitation which, according to appellant, can be adequately protected with a less restrictive approach than the imposition of death, i.e., life imprisonment.

Appellant's "least restrictive" argument, however, was rejected over eight years ago when the United States Supreme Court released its decisions in *Gregg* v. *Georgia* (1976), 428 U.S. 153; *Proffitt* v. *Florida* (1976), 428 U.S. 242; *Jurek* v. *Texas* (1976), 428 U.S. 262; *Woodson* v. *North Carolina* (1976), 428 U.S. 280; and *Roberts* v. *Louisiana* (1976), 428 U.S. 325.

In *Gregg*, *supra*, the court stated that "* * * the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."[8] The Supreme Court stated that the death penalty "* * * is an extreme sanction, suitable to the most extreme of crimes."[9] Appellant's argument is predicated upon societal protection, while the Supreme Court has recognized that the death penalty, as a sanction or punishment, is proper in extreme cases.

Alternatively, appellant argues that the death penalty violates the prohibition under the Eighth Amendment against cruel and unusual punishment and is therefore *per se* unconstitutional. We disagree. Clearly, any vitality which this argument may have had at the time of *Furman* v. *Georgia* (1972), 408 U.S. 238, was rejected in *Gregg* and its companion cases when the high court stated:

"We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it."[8]

Moreover, since the decision in *Gregg*, the recurring theme has been that states may constitutionally impose the sentence of death as long as the discretion of the sentencing authority is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" in imposing the sentence. *Zant* v. *Stephens* (1983), ___ U.S. ___, 77 L.Ed. 2d 235, at 248. The Supreme Court has stressed the necessity of "genuinely narrow[ing] the class of persons eligible for the death penalty," *id.* at 249, while requiring the capital sentencing procedure guide and focus "the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Jurek*, *supra*, at 273-274. With these principles in mind, appellant's argument, which requests the erection of a *per se* rule against the death penalty, must be rejected.

[8] *Gregg* v. *Georgia*, at 184.

[9] *Id.* at 187.

Appellant maintains, however, that the death penalty is applied in an arbitrary and capricious fashion since in administering capital statutory schemes prosecutors will inevitably exercise a certain degree of discretion. A similar argument was considered and rejected by both the majority and concurring opinions in *Gregg*.

Justice Stewart, writing for the court, addressed the argument at 199 as follows:

"First, the petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the State and the Georgia Board of Pardons and Paroles.

"The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. * * *"

In his concurring opinion, Justice White, joined by Chief Justice Burger and Justice Rehnquist, discussed the allegation of the exercise of arbitrary and capricious prosecutorial discretion as follows:

"Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently [illegible] or because the proof is in-

Johnson were wounded by bullets, Johnson mortally. At that instant Myhand felt a sharp pain in the back of his right knee. Apparently, believing that he had been shot, Myhand continued to hobble away from the bank and eventually fell to the ground.

Inside the bank, when appellant saw a police officer approach the front door and look inside he stated that they would have to shoot their way out and proceeded to fire a shot in the direction of the front door. After firing this single shot, appellant exited the bank where he and Johnson exchanged fire.

Having stumbled to the ground, Myhand looked back at the entrance of the bank where he saw both Johnson and appellant lying on the ground outside the bank's entrance. At that moment, Myhand observed a car backing toward him.

At this point Officers Jerome Howard and Gregory L. Henderson arrived on the scene in response to the original dispatch to the bank. Shortly before reaching the bank, Howard and Henderson had heard what they believed to be gunfire. Howard and Henderson observed Johnson and appellant lying in the vicinity of each other outside the bank as well as the car backing toward Myhand who was then struggling to get to his feet. Thinking that the approaching vehicle was attempting to run him over, Myhand drew his gun and fired a single shot at the car. Howard and Henderson both drew their weapons, each firing several shots in the direction of the car. Two of the car's tires were flattened and the passenger window was shattered. Nevertheless, the driver of the car managed to leave the scene of the shooting.[1]

Jordan then exited the bank, was disarmed, apprehended, and made to lie down near appellant. Appellant, Johnson, and Myhand were immediately transported by ambulance to the hospital. Johnson subsequently died of a gunshot wound to the head. Appellant received a gunshot wound which severed his spinal cord rendering him permanently paralyzed below the waist. It was revealed that Myhand had not been shot but that, in seeking cover, he suffered a compound fracture of the fibula.

Having received emergency medical treatment, appellant was interviewed by police officers in the hospital and gave a statement to the effect that he shot at the police because he did not want to get caught.

Appellant was indicted for aggravated murder with specifications,[1]

[1] The driver of the car, Douglas H. Robinson, was not involved in the commission of the robbery and appears to have been simply an innocent bystander. Robinson's account was that he had driven a neighbor to the bank and was waiting in the parking lot with the engine running and the gear in reverse when the shooting began. Robinson ducked to avoid the gunfire and lay down in the front of his car. Robinson's car then began to drift toward Myhand which prompted the police to fire upon Robinson's vehicle. Robinson received a gunshot wound to the back of his head but was able to drive to a friend's house and was taken to the hospital.

eight counts of aggravated robbery, two counts of attempted murder, eight counts of kidnapping, having a weapon while under a disability, and possession of criminal tools. Prior to trial, the state dismissed one kidnapping and one attempted murder count. The court at the request of both parties severed the charge of having a weapon while under a disability and ordered a separate trial on that count.

The cause proceeded to a jury trial. Upon the close of the state's case, the state dismissed two additional counts of kidnapping. The jury returned guilty verdicts on all counts, including the aggravated murder count and specifications relating to the death of Johnson. At the conclusion of the sentencing phase, the same jury recommended that appellant be sentenced to death. The trial court accepted the jury's recommendation and ordered that appellant be executed.

The court of appeals vacated appellant's conviction for possession of criminal tools on the basis of insufficient evidence. The court of appeals unanimously affirmed appellant's conviction and sentence in all other respects.

This cause is now before the court on appeal as of right.

Mr. John T. Corrigan, prosecuting attorney, *Mr. George J. Sadd* and *Mr. Thomas Marotta*, for appellee.

Mr. Hyman Friedman, county public defender, and *Ms. Marillyn Fagan Damelio*, for appellant.

Mr. Bruce Campbell and *Ms. Gail White*, urging reversal for *amicus curiae*, American Civil Liberties Union.

Mr. Randall M. Dana, public defender, *Mr. David C. Stebbins* and *Ms. Elizabeth Manton*, urging reversal for *amicus curiae*, Ohio Public Defender Commission.

CELEBREZZE, C.J. Today we review for the first time a conviction and death sentence subsequent to the reenactment of the death penalty in Ohio. See R.C. 2929.03 *et seq.* For the reasons to follow, we hold the death penalty statutes to be constitutional and, in this case, to have been applied in a constitutional manner. We further affirm appellant's conviction and hold that the death sentence in the case at bar is proper.

I

At the outset, we direct our attention to appellant's arguments that in spite of the overhaul undertaken by the General Assembly subsequent to the decision of the United States Supreme Court in *Lockett* v. *Ohio* (1978), 438 U.S. 586 [9 O.O.3d 26], the Ohio death penalty scheme is both unconstitutional on its face and as applied to appellant in this case in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution.

Appellant first chall[illegible]

Thereafter, the state carried the burden of proving by proof beyond a reasonable doubt that the aggravating circumstances appellant was found guilty of committing outweighed the mitigating factors. Since the trial court correctly interpreted the standards governing the burden of proving mitigating factors and by what degree, we are unable to find merit in this assignment of error.

Appellant next maintains that the imposition of the death penalty under Ohio's statutory structure is constitutionally infirm for failing to provide necessary and adequate guidance to the sentencing authority in relation to "weighing" aggravating circumstances and mitigating factors.

R.C. 2929.03(D)(2) provides in relevant part:

"Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment."[9]

Specifically, appellant focuses upon that portion of R.C. 2929.03(D)(2) which requires that the jury weigh aggravating circumstances against mitigating factors which are present in the case, arguing that the "weighing" process is an inarticulate and amorphous standard which deprived him of his Eighth Amendment protections due to the absence of a discernible legal standard. According to appellant, the constitutional defect arises because the sentencing authority receives no guidance in measuring such disparate factors as aggravating circumstances and mitigating factors beyond the term "weigh."

Appellant's argument is not novel. In *Proffitt*, *supra*, at 248, the

[9] The trial court at the sentencing phase charged the jury as follows:

"Outweigh. To outweigh means to weigh more than, to be more important than. The existence of mitigating factors does not preclude or prevent the death sentence if the aggravating circumstances outweigh the mitigating factors.

"It is the quality of the evidence that must be given primary consideration by you. The quality of the evidence may or may not be commensurate with the quantity of the evidence, that is, the number of witnesses or exhibits presented in this case.

"* * *

"If all twelve members of the jury find, by proof beyond a reasonable doubt, that the aggravating circumstances which Leonard Jenkins was found guilty of committing outweigh

Florida statute directed that the jury consider " '* * * [w]hether sufficient mitigating circumstances exist * * * which outweigh the aggravating circumstances found to exist; and * * * [b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death.' [Fla. Stat. Ann. Sections 921.141(2)(b) and (c) (1976-1977 Supp.)] * * *." In his argument before the Supreme Court the petitioner maintained that the weighing process was an inarticulate standard, making it impossible for the sentencing authority to rationally determine whether, in a given case, aggravating circumstances outweigh the mitigating factors.

In upholding the Florida standard, the court reasoned as follows:

"While these questions and decisions may be hard, they require no more line drawing than is commonly required of a factfinder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

"The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed." *Id.* at 257-258.

In view of the foregoing, we are constrained to reject appellant's argument that by requiring sentencing authorities to "weigh" aggravating circumstances against mitigating factors, the General Assembly somehow failed to limit the sentencing authority's discretion and focus its attention upon the circumstances of the capital offense and the individual offender when considering whether to return a verdict imposing the death penalty.[10]

Appellant next maintains that by requiring proof of aggravating circumstances at the guilt phase of the trial, rather than at the sentencing phase, Ohio has effectively prohibited individualized sentencing required under post-*Furman* cases.[11] In support of this contention, appellant

[10] The concept of "weighing" aggravating circumstances and mitigating factors as contained under R.C. 2929.03(D)(2) was approved in *Gregg*, wherein the court cited with approval the suggestion in the Model Penal Code that aggravating circumstances and mitigating factors "should be weighed *and weighed against each other*." (Emphasis sic.) *Id.* at 193.

[11] Appellant also submits that since the same jury which convicted him also sentenced him, he was denied a fair and [illegible]

sufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt. Thus the prosecutor's charging decisions are unlikely to have removed from the sample of cases considered by the Georgia Supreme Court any which are truly 'similar.' If the cases really were 'similar' in relevant respects, it is unlikely that prosecutors would fail to prosecute them as capital cases; and I am unwilling to assume the contrary." *Id.* at 225.

Moreover, as recognized by Justice White in his concurring opinion in *Gregg*, appellant's argument represents an indictment of our entire criminal justice system which must be constitutionally rejected. *Id.* at 226.

Next, appellant contends the Ohio death penalty scheme is unconstitutional for failing to require premeditation or deliberation as the culpable mental state for defendants in all capital cases.[8] Specifically, appellant relies upon the concurring opinion of Justice White in *Lockett* v. *Ohio*, *supra*, at 621, wherein the view was expressed that the imposition of the death penalty upon one who did not possess at least a purpose "to cause the death of the victim" would likely violate the prohibition contained in the Eighth Amendment against cruel and unusual punishment.[7]

In *Edmund* v. *Florida* (1982), 458 U.S. 782, Justice White, writing for the majority, concluded that imposition of the death sentence upon an individual who aids or abets a felony but who does not kill, attempt to kill or intend to kill, violates the Eighth Amendment. In that decision, the high court favorably cited a number of state statutes, including R.C. 2903.01(B), (C) and (D), as well as R.C. 2929.02(A) and 2929.04(A)(7), which preclude the imposition of a death sentence unless the defendant is specifically found to have intended to cause the death of another by proof beyond a reasonable doubt. *Id.* at 790, fn. 7.

Contrary to appellant's contention, the Eighth Amendment does not require that in order to be subject to a death sentence, the defendant must have committed the murder with prior calculation and design. Cf. *Ed-*

[8] R.C. 2903.01 provides, in relevant part:

"(A) No person shall purposely, and with prior calculation and design, cause the death of another.

"(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

"(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

"(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. * * *"

[7] 438 U.S. 586, at 624.

mund, *supra*. Instead, the culpable mental state which must be proven in Ohio, consistent with Eighth Amendment protections, is that the defendant specifically intended to cause the death of another. Accordingly, we find appellant's contention to be without merit.

Without citation to legal authority, appellant further argues that the death penalty in Ohio is constitutionally defective since the state is not required to prove the absence of any of the mitigating factors. Simply stated, this argument represents an attempt by appellant to have this court impose upon the state a burden not required under either the Ohio or United States Constitutions. The concept of weighing aggravating circumstances proved beyond a reasonable doubt against any existing mitigating factors was approved in *Proffitt*, and its vitality continues today. See *Barclay* v. *Florida* (1983), ____ U.S. ____, 77 L.Ed. 2d 1134.

Appellant also contends his death sentence should be set aside for the reason that R.C. Chapter 2929 fails to explicitly identify whether the defendant bears the burden of proving the existence of mitigating factors, and what standard of proof must be utilized in determining their presence. We disagree. An examination of the pertinent statutory provisions which address the subject of mitigating factors demonstrates that the statute does indeed provide the direction that appellant claims is lacking.

For example, R.C. 2929.03(D)(1) provides, in pertinent part:

"The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death."

This statutory section unambiguously answers appellant's charge as to who bears the burden of proving the existence of mitigating circumstances, by specifically placing the burden on the defendant to go forward with evidence of mitigation. The question remains, however, as to what standard of proof applies to mitigating factors.

Although the standard is not readily apparent from a reading of R.C. 2929.03 or 2929.04, the Committee Comment to the former R.C. 2929.03[9] resolves any uncertainty. Therein, it is stated that "* * * [m]itigation must be established by a preponderance of the evidence, and the rules of evidence also apply in this phase of the trial [except that] (the requirement for a pre-sentence investigation and report, the requirement for a psychiatric examination and report, and the provision for an unsworn statement by the defendant, represent partial exceptions to the rules of evidence)."

In the present case, the trial court placed the burden of proving mitigating factors by a preponderance of the evidence upon appellant.

[9] 134 Ohio Laws, Part II, 1866, 1978-1981

quirement for a jury, when recommending a sentence of life imprisonment over the imposition of the death penalty, to identify the existence of mitigating factors and why those factors outweigh the aggravating circumstances.

We first observe that appellant's argument that proportionality review is constitutionally required is without merit. In *Pulley* v. *Harris* (1984), ___ U.S. ___, 79 L. Ed. 2d 29, the Supreme Court held that neither *Gregg*, *Proffitt* nor *Jurek* established proportionality review as a constitutional requirement. *Id.* at 39. In reaching this conclusion, the court reasoned as follows:

"Needless to say, that some schemes providing proportionality review are constitutional does not mean that such review is indispensable. We take statutes as we find them. To endorse the statute as a whole is not to say that anything different is unacceptable. As was said in *Gregg*, '[w]e do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis. 428 U.S., at 195 * * *. Examination of our 1976 cases makes clear that they do not establish proportionality review as a constitutional requirement."[16]

Thus, although viewed as commendable, the decision in *Pulley* demonstrates that proportionality review is not constitutionally required in every case. Other factors which minimize the risk of arbitrary and capricious sentencing include bifurcated proceedings, the limited number of chargeable capital crimes, the requirement that at least one aggravating circumstance be found to exist and the consideration of a broad range of mitigating circumstances. In conjunction with prior United States Supreme Court decisions, the General Assembly incorporated the aforementioned factors into Ohio's death penalty statutes, as well as providing proportionality review -- a meaningful function which reduces the arbitrary and capricious imposition of death sentences.

The question remains whether the absence of a requirement that juries specify the mitigating factors which they found to exist, and why these factors outweigh aggravating circumstances, creates a fatal defect in the statutes. We hold that it does not.

"The fundamental purpose behind proportionality review is to ensure that sentencing authorities do not retreat to the pre-*Furman* era when sentences were imposed arbitrarily, capriciously and indiscriminately. To achieve this result, state courts traditionally compare the overall course of conduct for which a capital crime has been charged with similar courses of conduct and the penalties inflicted in comparable cases. See *Gregg* at 204-206, and *Proffitt* at 259-260.

The system currently in place in Ohio enables this court to obtain a vast quantity of information with which to effectuate proportionality review, beginning with data pertinent to *all* capital indictments and concluding with the sentence imposed on the defendant, whether or not a plea is entered, the indictment dismissed or a verdict is imposed by the sentencing authority. See R.C. 2929.021, *supra*, at fn. 13. Although appellant would have this court require juries returning a life sentence to specify which mitigating factors were found to exist and why they outweigh aggravating circumstances, we conclude that such information is not an indispensable ingredient in assisting us to determine whether the imposition of a death sentence is disproportionate to sentences imposed for similarly proscribed courses of conduct.

Appellant further asserts that R.C. 2929.03 and 2929.04 are unconstitutional for treating felony murders in a different manner than premeditated murders. According to appellant, a principal in a felony murder is treated more harshly than a defendant charged with a premeditated murder, since a felony murder constitutes one of the eight aggravating circumstances under R.C. 2929.04, while premeditation is not set forth as an aggravating circumstance. Stated otherwise, appellant argues that aggravating factors for felony murders simply duplicate an element of the offense while a murder by prior calculation and design requires proof of a separate aggravating circumstance in order to justify a death sentence. As such, appellant argues that a single act should not both convict and aggravate.

Assuming, *arguendo*, that the elements set forth under R.C. 2929.04(A)(7) are identical to those set forth under R.C. 2903.01(B),[17] we need only review the Texas statute at issue in *Jurek* to determine whether such a practice is constitutionally proscribed.

The Texas statute under consideration in *Jurek* did not set forth a category of statutory aggravating circumstances which, if proven, would justify the imposition of the death penalty. Instead, the Texas system set forth five classes of murders the existence of any one of which would justify the imposition of a death sentence. The high court took notice of the fact that the five classes of murder set forth in the Texas statute en-

and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. * * *"

[16] 79 L. Ed. 2d 29, 37.

[17] It is noteworthy that R.C. 2903.01(B) and 2929.04(A)(7) are not identical. First, crimes such as robbery, arson and burglary, contained under R.C. 2903.01(B), are noticeably absent from R.C. 2929.04(A)(7). More importantly, while a conviction under R.C. 2903.01(B) cannot be sustained unless the defendant is found to have intended to cause the death of another, the state, in order to prevail upon an aggravating circumstance under R.C. 2929.04(A)(7), must additionally prove that the offender was the principal offender in the commission of the aggravated murder or, if the offender was not the principal offender, that the aggravated murder was committed with prior calculation and design.

directs our attention to the Georgia and Florida statutes at issue in *Gregg* and *Proffitt*, where under each statute the determination of guilt is separated from the consideration of aggravating circumstances.

In considering this contention, it is important to keep in mind the following principle stressed in *Gregg*, *supra*, at 195:

"We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis."

Thus, although Ohio's capital scheme does differ from those under consideration in *Gregg* and *Proffitt* insofar as when aggravating circumstances are considered in a capital case, this difference does not, in and of itself, render the Ohio scheme unconstitutional. On the contrary, in *Jurek* the high court upheld the Texas death penalty statute which, like Ohio's, requires the jury to consider *at the guilt phase* whether the crime falls into a particular category justifying capital punishment.[11]

In comparing the Georgia and Florida statutes with the Texas statute the court observed that "[e]ach [statute] requires the sentencing authority to focus on the particularized nature of the crime." *Id.* at 271. Equally important was the court's lack of concern for whether aggravating circumstances are proven at the guilt or sentencing phase, as long as at the sentencing phase the jury is allowed to consider factors in mitigation of the imposition of a death sentence. *Id.*

The system currently in place in Ohio does require the sentencing authority to focus on the particular nature of the crime as well as allow the accused to present a broad range of specified and nonspecified factors in mitigation of the imposition of a death sentence. Thus, we are unable to agree with appellant's contention that the consideration of aggravating circumstances at the guilt stage of his trial was constitutionally prohibited.

In his next contention appellant focuses upon the requirements of R.C.

Amendments to the United States Constitution, as well as Sections 10 and 16, Article I of the Ohio Constitution. Appellant illustrates this contention by arguing that if defense counsel pursues a defense at the guilt phase of a capital trial which affects defendant's credibility, then his credibility is diminished at the sentencing stage. Suffice it to say that although the Supreme Court has endorsed bifurcated proceedings in death penalty cases, see *Zant* v. *Stephens*, *supra*, at 248, the court has yet to even remotely suggest that the Constitution requires a new jury be selected for the sentencing phase. Accordingly, we are unable to accept appellant's contention.

[11] Although the statute under consideration in *Jurek* did not set forth a list of aggravating circumstances *per se*, it did narrow the categories of murder for which the death penalty could be imposed to such an extent that the Supreme Court concluded the categories served much the same purpose as do aggravating circumstances.

2929.021,[12] 2929.03[14] and 2929.05,[15] arguing that the extent of proportionality review in Ohio is constitutionally infirm. In the main, appellant contends that proportionality review in Ohio is flawed since there is no re-

[12] R.C. 2929.021 provides:

"(A) If an indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the clerk of the court in which the indictment is filed, within fifteen days after the day on which it is filed, shall file a notice with the supreme court indicating that the indictment was filed. The notice shall be in the form prescribed by the clerk of the supreme court and shall contain, for each charge of aggravated murder with a specification, at least the following information pertaining to the charge:

"(1) The name of the person charged in the indictment or count in the indictment with aggravated murder with a specification;

"(2) The docket number or numbers of the case or cases arising out of the charge, if available;

"(3) The court in which the case or cases will be heard;

"(4) The date on which the indictment was filed.

"(B) If the indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the defendant pleads guilty or no contest to any offense in the case or if the indictment or any count in the indictment is dismissed, the clerk of the court in which the plea is entered or the indictment or count is dismissed shall file a notice with the supreme court indicating what action was taken in the case. The notice shall be filed within fifteen days after the plea is entered or the indictment or count is dismissed, shall be in the form prescribed by the clerk of the supreme court, and shall contain at least the following information:

"(1) The name of the person who entered the guilty or no contest plea or who is named in the indictment or count that is dismissed;

"(2) The docket numbers of the cases in which the guilty or no contest plea is entered or in which the indictment or count is dismissed;

"(3) The sentence imposed on the offender in each case."

[14] R.C. 2929.03(D)(2) provides in relevant part:

"Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

"If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section."

[15] R.C. 2929.05 pertinently provides:

"* * * In determining whether the sentence of death is appropriate, the court of appeals

penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard."

In applying the principle set forth in *Witherspoon*, *supra*, and reflected in R.C. 2945.25(C), in order to uphold appellant's conviction and death sentence, we must be able to safely conclude from the record that the four jurors excluded under the authority of *Witherspoon*, *supra*, would have been "*unwilling* 'to *consider* all of the penalties provided by state law,' and that each was 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.' * * *" (Emphasis *sic*.) *State* v. *Anderson* (1972), 30 Ohio St. 2d 66, 70 [59 O.O.2d 85], quoting *Witherspoon*, *supra*, at 522. See, also, *State* v. *Bayless* (1976), 48 Ohio St. 2d 73 [2 O.O.3d 249], vacated in part on other grounds (1978), 438 U.S. 911. Thus we held at paragraph three of the syllabus in *State* v. *Wilson* (1971), 28 Ohio St. 2d 15 [57 O.O.2d 95], that:

"In selecting the members of a jury, unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it cannot be assumed that this is his position."

As a necessary corollary to the requirement that a potential juror unequivocally state that he or she would never vote to impose death as a penalty, this court has steadfastly recognized that:

"Compliance with the requirements of *Witherspoon* v. *Illinois*, 391 U.S. 510 [46 O.O.2d 368], necessarily includes sufficient latitude in the *voir dire* examination of prospective jurors in a capital case to establish that those who are dismissed for cause upon the basis of their scruples regarding capital punishment would automatically vote against the imposition of a sentence of death no matter what the trial might reveal." *State* v. *Anderson*, *supra*, at paragraph one of the syllabus.

However, in *State* v. *Wilson* (1972), 30 Ohio St. 2d 199 [59 O.O.2d 220], syllabus, this court held:

"After a venireman has unambiguously stated, on jury *voir dire*, that he could not vote for the death penalty under any circumstances, a *Witherspoon* violation cannot be predicated merely upon his ambiguous response to a question of defendant's counsel as to whether there is 'anything about the nature of this case that would keep you from listening on the question of the death penalty.' "

The focus of our inquiry must now turn to the *voir dire* of the four excluded jurors.

The first potential juror so excused was Bernard Klein. Klein first responded to the trial judge that he did not believe in capital punishment. Upon further examination by the prosecutor, Klein made the following responses:

"Q. I believe you told Judge Matia that you do not believe in capital punishment.

"A. That's right.

"Q. Many of us have a philosophy one way or we do believe or we do not believe. I am going to ask you, Mr. Klein, even though you do not believe in capital punishment, is it your statement that your disbelief in capital punishment is such that you could not and would not find somebody guilty of a crime in any instance wherein the punishment was capital punishment?

"MR. TITTLE [appellant's trial counsel]: Objection.

"THE COURT: Overruled.

"* * *

"A. * * * There is — how shall I put it? I could say yes, he is guilty, but I could not say, 'Well, this man should be committed to whatever the capital punishment would be.'

"'This, I couldn't live with.

"Q. You would consider that in no way?

"A. *I couldn't do it.*" (Emphasis added.)

Appellant's counsel was then able to elicit a statement from Klein to the effect that he would consider the death penalty if an individual had murdered one of Klein's sons in the presence of Klein. Nevertheless, Klein further responded to questioning by appellant's counsel in the following manner:

"Q. Are you saying, sir, that even in a case where a multiple murderer were brought into this courtroom, who had committed vicious ungodly acts, that you would be unable to impose the death penalty?

"A. *Yes.*

"* * *

"Q. * * * But if I understand you correctly, and you correct me if I am wrong, if there were a violent crime that was proved to your absolute satisfaction, you could do it then?

"A. You always have that doubt in your mind, you would always have that doubt in your mind and say, gee, I sent this man to his death or whatever.

"Q. You have said in the case properly proven you would consider it as a penalty?

"A. *No, I didn't say that.*

"Q. Also the law, sir, does not say that you will ever, ever have to impose the death penalty, only that you would have to consider it as a possible penalty.

"Could you tell me that you would never consider it as a possible penalty?

"A. I told you in such cases I would." (Emphasis added.)

The examination of Klein reveals quite clearly that his feelings regarding capital punishment transcended mere moral opposition against its imposition. Rather, Klein unequivocally stated that he would not consider capital punishment as a penalty under any circumstance. At this point,

compassed the separate aggravating circumstances set forth in the Georgia and Florida statutes under consideration in *Gregg* and *Proffitt*.

In sustaining the Texas statute, wherein the conduct which convicts also aggravates, the court stated:

"* * * So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option — even potentially — for a smaller class of murderers in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime." *Jurek*, *supra*, at 271.

Applying *Jurek* to the arguments raised by appellant in the present case demonstrates that even if we were to construe the aggravated conduct of felony murder set forth within R.C. 2903.01(B) as functionally equivalent to the aggravating circumstance under R.C. 2929.04(A)(7), no constitutional infirmities would arise. On the contrary, any duplication is the result of the General Assembly having set forth in detail when a murder in the course of a felony rises to the level of a capital offense, thus, in effect, narrowing the class of homicides in Ohio for which the death penalty becomes available as a sentencing option.

Under his final contention, appellant maintains that the sentencing scheme in Ohio falls below constitutional standards by failing to afford the sentencing authority the option to impose a life sentence of imprisonment or to grant mercy, regardless of whether aggravating circumstances outweigh mitigating factors. In support of this contention, appellant focuses upon both the Florida and Georgia statutes which, as discussed by Justice Stevens in his concurrence in *Barclay* v. *Florida*, *supra*, at 1149, authorize the sentencing authority to grant life imprisonment even where the defendant has crossed the statutory threshold and could be subjected to death.

Appellant seizes upon the following language of Justice Stevens' concurrence, arguing that the sentencing authority must be given an opportunity to find the death penalty inappropriate when "statutory aggravating circumstances exist, and arguably outweigh statutory mitigating circumstances, but they are insufficiently weighty to support the ultimate sentence * * *." *Id.* at 1153. As Justice Stevens noted, however, immediately following the above-described passage, is that a second category exists under the Florida scheme where "even though *statutory* mitigating circumstances do not outweigh statutory aggravating circumstances, the addition of nonstatutory mitigating circumstances tips the scales in favor of life imprisonment." (Emphasis *sic*.) *Id.*

Under R.C. 2929.04(B)(7) and (C), defendants are given great latitude in the presentation of *any* relevant factors in mitigation of the imposition of a death sentence. Accordingly, even if states were constitutionally required to adopt one of the two methods described by Justice Stevens in his concurrence in *Barclay*, Ohio's system presently coincides with the second

category by requiring the sentencing authority to consider and weigh against aggravating circumstances any relevant mitigating factors which the defendant presents.

In conclusion, we hold that Ohio's statutory framework for imposition of capital punishment, as adopted by the General Assembly effective October 19, 1981, and in the context of the arguments raised herein, does not violate the Eighth and Fourteenth Amendments to the United States Constitution or any provision of the Ohio Constitution.

II

Appellant next argues that he was denied his right to a fair trial by an impartial jury when the trial court excused four jurors for cause under the authority of *Witherspoon* v. *Illinois* (1968), 391 U.S. 510 [46 O.O.2d 368], and its progeny. Appellant further argues that the so-called death qualification process of a jury prior to the guilt phase of a capital prosecution is a *per se* violation of an accused's Sixth and Fourteenth Amendment rights since the death-qualified jury is claimed to be predisposed to convict.

In *Witherspoon* v. *Illinois*, *supra*, at 522, the United States Supreme Court held "that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[9] The rationale of the *Witherspoon* decision was that the exclusion of prospective jurors who voiced general objections to the death penalty produced a jury "uncommonly willing to condemn a man to die." *Id.* at 521. Specifically, however, the Supreme Court stated:

"* * * [N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." (Emphasis *sic*.) *Id.* at 522-523, fn. 21.

R.C. 2945.25 provides in part that:

"A person called as a juror in a criminal case may be challenged for the following causes:

"* * *

"(C) In the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instruction of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror's conscientious or religious opposition to the death

[9] See, also, *Boulden* v. *Holman* (1969), 394 U.S. 478, and *Maxwell* v. *Bishop* (1970), 398 U.S. 262.

would go to the electric chair, is it my understanding you could not and would not vote for the death penalty?

"A. *I would not.*" (Emphasis added.)

On examination by appellant's trial counsel, Sealey denied making the foregoing statements in order to be removed from the jury and explained that her prior statements to the effect that she would follow the trial court's instructions had not been completely accurate. Sealey then responded that she had misunderstood the earlier inquiry and had felt that she was required to respond in the manner that she did. The trial court thereafter excused Sealey for cause.

We find no error in this procedure. Appellant's argument to the contrary notwithstanding, we are not of the opinion that once a potential juror has been passed for cause, that juror may never be challenged for cause at a later stage in the proceedings should it subsequently become apparent that a seated juror is subject to a challenge for cause. Neither Crim. R. 24 nor R.C. Chapter 2945 prohibits a challenge for cause after the parties have initially declined to challenge the potential juror for cause. To fashion such a rule as appellant advocates would mean that a juror who becomes properly subject to a challenge for cause after having survived the initial *voir dire* would become immune from such a challenge for cause. Here, Sealey, upon reflection, stated that under no circumstance would she vote for the death penalty, after having testified earlier that she would follow the judge's instructions. It is beyond question that Sealey's statements satisfy the *Witherspoon* standard for exclusion. It is of no moment that her statements to that effect came after she had stated that, if she had no other choice, she would follow the trial court's instructions. Sealey's statement that she would follow the law is, at best, ambiguous in light of her preceding statement that she would not vote for the death penalty. *State* v. *Wilson, supra.* Accordingly, given Sealey's unequivocal commitment to vote against the death penalty under any circumstance and no matter what the facts were, the trial court did not err in excusing this juror in the trial of appellant.

Appellant next contends that the excusal of potential juror Sherry A. Tedeschi was improper. The examination of Tedeschi by the trial court proceeded as follows:

"Q. So what I ask you then is, are you religiously, morally, philosophically or otherwise against the imposition of the death penalty?

"A. *Yes.*

"Q. Listen to the second question as carefully as you obviously did the first.

"Even though you have a conscientious, religious, philosophic or other opposition to the death penalty, will you nevertheless, notwithstanding your feeling you have just told me about, would you nevertheless follow my instructions as Judge and fairly consider the imposition of a sentence of death, if appropriate in this case? Yes or no.

"A. *No.*

"Q. I ask you further, understanding your two answers, are you stating to me unequivocally that under those circumstances will you follow my instructions as Judge and that you cannot and will not consider fairly the imposition of the sentence of death if appropriate, in this case?

"A. *That is correct.*

"Q. Now, you understand the question fully?

"A. *I will not deliver that sentence.*

"Q. I will ask the question in stronger terms. Do you unequivocally state that under no circumstances will you follow my instructions as Judge and consider fairly the imposition of the sentence of death, if appropriate, in this case?

"A. *That is right.*" (Emphasis added.)

On examination by appellant's counsel, Tedeschi responded as follows to the following inquiry:

"Q. You have heard, I am sure in your lifetime, things concerning some very vicious and heinous acts, where multiple murders occurred and one person was responsible, correct?

"A. Yes, I have.

"Q. If it were shown that a defendant in a particular case was that type of person, guilty of those types of crimes, and you were called to deliberate on a verdict on that type of case, are you saying to the court and to me that even in that circumstance, you could not impose the death penalty?

"A. *That's correct.*" (Emphasis added.)

Tedeschi was thereupon excused. The record amply establishes Tedeschi's unequivocal commitment not to consider the death penalty under any circumstance and not to follow the trial court's instruction relating to capital punishment. This potential juror's exclusion was consequently proper under *Witherspoon* and the trial court committed no error in so doing.

The final potential juror excused under the authority of *Witherspoon* was Bonnie Gwynn who was excused as an alternate juror. Upon examination by the trial court and the prosecutor, Gwynn stated initially that she would follow the trial court's instructions and was not against capital punishment. However, when the discussion turned to the potential penalty phase of this proceeding the following exchange took place:

"Q. [By the prosecutor] If you find it to be appropriate, based upon your determination of that evidence and the law that his Honor gives you, it will then become necessary that a jury of 12 people unanimously sign the verdict form indicating, if appropriate, that they recommend the imposition of the death penalty. You must sign a form. Are you with me?

"A. Yes, I follow you.

"Q. If that comes to pass if it is appropriate based upon the informa-

this potential juror was subject to challenge for cause under the authority of *Witherspoon* and its progeny. In our view, *Witherspoon* does not require a formalistic examination of potential jurors using the precise language of the *Witherspoon* opinion. We need only be satisfied that the potential juror be unwilling to consider capital punishment as a penalty and was committed to voting against the death penalty regardless of the facts of the case. To that extent we are satisfied that Klein unambiguously expressed those commitments.

We are cognizant that Klein's commitment against imposition wavered momentarily when asked if he could consider the death penalty if someone had murdered one of Klein's sons in Klein's presence. Such a momentary hesitation on the part of this potential juror, in response to a hypothetical factual situation not presented by the facts of the case to be tried, will not be considered to abate this potential juror's commitment not to consider the death penalty. We faced a similar situation in *State* v. *Wilson, supra,* where a potential juror gave an ambiguous response to a question after having unambiguously stated that the juror was unalterably opposed to the death penalty. In upholding the challenge for cause of that juror, we stated in *Wilson, supra,* at 202, that the juror's "prior unambiguous responses showed that she was irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings." Such is the case at bar and does not command a finding that the trial court committed prejudicial error in excusing Klein as a juror in the trial of appellant.

Appellant next challenges the propriety of the exclusion of potential juror Margaret Sealey. Sealey was initially examined by the prosecutor as to her views on capital punishment as follows:

"Q. * * * Does this mean then in a properly proven case, proof beyond a reasonable doubt, all of the elements of the charge, all the elements of the charge, all the elements of the aggravated murder, all the elements of the aggravated circumstances, that regardless of the nature of the case, and with that degree of proof, that you would, under these circumstances, vote yes for the death penalty?

"A. No, I wouldn't.

"* * *

"Q. You wouldn't what?

"A. I wouldn't vote yes.

"Q. You would not vote for the death penalty?

"A. No."

Sealey reiterated her sentiment on examination by appellant's trial counsel that she would refuse to consider the death penalty as possible punishment. Sealey affirmatively responded to inquiry by the trial court as to whether she was religiously or morally against the imposition of the death penalty. Ultimately, Sealey indicated that, if she had no other

choice, she would follow the law and vote to impose the death penalty. Neither side challenged this juror for cause.

Several days later, while *voir dire* was still taking place, Sealey approached the trial judge and privately informed him that she suffered from hypertension, the symptoms of which were headaches and nosebleeds. Sealey also explained that she had trouble sleeping since being selected as a juror. The trial court transcribed Sealey's discussion in chambers and had it read to the prosecutor and appellant's counsel. The prosecutor stated that he had no objection to excusing Sealey but appellant's counsel insisted that she remain. The trial court declined to excuse her at that point.

Sealey approached the trial court again the next day. Sealey made the following remark to the trial court in chambers:

"I don't feel that I could go through with it, with this case, that long, that length of time, and then, too, I don't believe in capital punishment and I don't think it would be fair for me to proceed with it, with the way I feel, because I — if everybody else votes for capital punishment, I will have to vote against it, even if I feel that he is guilty."

This statement was read to counsel at which point the prosecutor challenged for cause on the basis of Sealey's unequivocal opposition to capital punishment. The trial court proceeded to examine this potential juror as follows:

"Q. Your conscientious, religious, philosophic or other objections to the death penalty are not grounds for you to be excused as a juror. I ask you, therefore, this question: Are you in fact religiously, morally, philosophically or otherwise against the imposition of the death penalty?

"A. Yes.

"Q. Even though you have a conscientious, religious, philosophic, or other opposition to the death penalty, will you nevertheless follow my instructions, as Judge, and fairly consider the imposition of a death sentence, if appropriate in this case? Yes or no, Mrs. Sealey?

"A. *No.*

"Q. What?

"A. *No.*

"Q. Mrs. Sealey, are you stating to me unequivocally that under no circumstances will you follow my instructions as Judge, and that you cannot and will not consider fairly and [*sic*] imposition of the sentence of death, if appropriate, in this case?

"*Yes.*" (Emphasis added.)

Upon examination by the prosecutor, Sealey testified:

"Q. So that if you came to that point and if your fellow jurors came to the point that the man is guilty, and that proof is beyond a reasonable doubt, and that is the instructions of Judge Matia would call for a vote of guilty under those circumstances, and if that vote of guilty meant that he

ment was rejected for what we believe to be sound reasons. The court in *Keeten*, *supra*, stated at 133:

"Although the right to a jury trial includes the right to a jury venire drawn from a representative cross-section of the community,[10] it does not include the right to be tried by jurors who are unable or unwilling to follow the law and the instructions of the trial judge in a capital case."

It was stated by the United States Supreme Court in *Adams* v. *Texas* (1980), 448 U.S. 38, 45, that:

"The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court."

The thrust of appellant's argument is that he feels entitled to a jury more likely to acquit rather than an impartial jury. *Keeten*, *supra*, at 134. It was stated in *Smith* v. *Balkcom* (C.A. 5, 1981), 660 F. 2d 573, 579, certiorari denied (1982), 459 U.S. 882:

"The guarantee of impartiality cannot mean that the state has a right to present its case to the jury *most* likely to return a verdict of guilt, nor can it mean that the accused has a right to present his case to the jury *most* likely to acquit. But the converse is also true. The guarantee cannot mean that the state must present its case to the jury *least* likely to convict or impose the death penalty, nor that the defense must present its case to the jury *least* likely to find him innocent or vote for life imprisonment." (Emphasis sic.)

It follows that, in striving to achieve an impartial jury — one that will fairly judge the facts and apply the law as instructed — the principles set forth in *Witherspoon*, *supra*, justify excluding those jurors who would never impose the death penalty. Jurors subject to challenge under *Witherspoon* because they refuse to follow the law not only render the jury impartial for the penalty phase, but also for the guilt phase, of the trial as well. Accord *Rector* v. *State* (1983), 280 Ark. 385, 659 S.W. 2d 168.

Accordingly, we hold that to death-qualify a jury prior to the guilt phase of a bifurcated capital prosecution does not deny a capital defendant a trial by an impartial jury.

III

Appellant next argues that he was denied his statutory and constitutional rights to present evidence in mitigation of the death penalty by the trial court's action in excluding, as either irrelevant or incompetent, evidence proffered for purposes of mitigation at the sentencing phase of trial.

R.C. 2929.04(B) requires the court and jury to consider as mitigating factors:

"* * * the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

"(1) Whether the victim of the offense induced or facilitated it,

"(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

"(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

"(4) The youth of the offender;

"(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

"(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

"(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death."

R.C. 2929.04(C) further provides that a defendant shall be given great latitude in the presentation of evidence concerning mitigating factors.

These provisions are in conformity with the holding of the United States Supreme Court that "* * * the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis sic.) *Lockett* v. *Ohio*, *supra* (438 U.S.), at 604. This holding was recently reaffirmed in *Eddings* v. *Oklahoma* (1982), 455 U.S. 104, 113-114, the court stating:

"Just as a State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." (Emphasis sic.)

Thus, courts are required to consider all *relevant* mitigating evidence. As a footnote to the passage cited above from *Lockett*, the court stated that, "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Lockett*, *supra*, at 604, fn. 12.

The testimony of three witnesses was excluded as irrelevant, including that of Dr. William C. Bailey, a social scientist from Cleveland State University. Bailey's testimony, to the effect that statistics failed to show that capital punishment was a deterrent to murder, was proffered for the record.

Second, the trial court excluded as irrelevant the testimony of Lloyd McClendon, a former death

tion given to you and the law that his Honor gives you, are you telling us that you could not sign such a verdict form?

"A. *I could not sign a verdict form.*

"Q. If I understand you correctly, you are saying unequivocally at this point you will not sign a verdict form if appropriate to capital punishment in this case?

"A. *That's right.*" (Emphasis added.)

Appellant's counsel declined to inquire of Gwynn and the trial court excused this potential juror for cause upon the prosecutor's request. Gwynn's remarks unquestionably indicate that she was "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." *Witherspoon*, *supra*, at 522, fn. 21; *State* v. *Anderson*, *supra*, at 70. As a result, Gwynn was properly excused under *Witherspoon*. Moreover, the jury that was ultimately impaneled served as originally constituted throughout the guilt and penalty phases. Thus, there was no need to seat an alternate juror at any stage of the proceeding. Even if Gwynn had not been excused, she would not have deliberated appellant's fate. Accordingly, there was no error in excusing this potential juror from appellant's trial.

Appellant argues that he was not afforded sufficient latitude in *voir dire* to properly examine the potential jurors regarding their attitudes concerning capital punishment. Appellant correctly states that sufficient latitude must be afforded in the *voir dire* of prospective jurors in a capital case in order to establish that any jurors excused as being opposed to capital punishment were excused within the confines of *Witherspoon*. See *State* v. *Anderson*, *supra*, at paragraph one of the syllabus, and R.C. 2945.25(C). Examination of the record in the case at bar indicates that any restrictions placed on appellant's examination of prospective jurors did not constitute reversible error. The general rule is that the scope of the examination of prospective jurors is within the discretion of the trial court and the judgment will only be reversed upon a showing that the trial court abused its discretion in restricting the scope of *voir dire*. *Pavlonis* v. *Valentine* (1929), 120 Ohio St. 154, 157; *Dowd-Feder, Inc.* v. *Truesdell* (1936), 130 Ohio St. 530 [5 O.O. 179]; *State* v. *Anderson*, *supra*, at 72-73.

In the case at bar, appellant sought to ask questions of the prospective jurors who had expressed a commitment to vote against the death penalty under all circumstances concerning whether these prospective jurors would vote for the death penalty if Adolf Hitler or Charles Manson were the accused. While the trial court did not permit such questioning, appellant was permitted to ask Klein whether he would agree to the death penalty if one of his sons had been murdered. Appellant was likewise permitted to propose the situation of a mass murder to Klein and Tedeschi. We find no abuse of discretion in the limitation of *voir dire* by the trial court. Appellant's reliance on *State* v. *Anderson*, *supra*, does not compel

reversal of appellant's death sentence. In *Anderson* both the prosecutor and defense counsel were prohibited from asking any questions whatsoever of prospective jurors concerning their attitudes toward capital punishment. Appellant is hardly in a position to argue that an analogous situation is presented in the instant case.

Accordingly, the jurors in this case who were dismissed based on their views against capital punishment were excused in a manner consistent with *Witherspoon* v. *Illinois*, *supra*, and its progeny, as well as within the standard set forth in R.C. 2945.25(C).[9]

Appellant next argues that two separate juries are required in a capital case since "death-qualifying" a jury prior to the guilt phase renders that jury prone to convict and deprives a capital defendant of an impartial and representative jury. Appellant's position is that a non-death-qualified jury must decide guilt or innocence and then, if the defendant is convicted of a capital offense, a second jury, which may be death-qualified, must be impaneled to determine whether to recommend the death penalty. We are unpersuaded by appellant's argument.

As we have already discussed under Part I of this decision, the United States Supreme Court, although sanctioning the bifurcation of capital prosecutions into guilt and penalty phases, has never required separate juries for each phase. Appellant argues herein that the United States Supreme Court in *Witherspoon* v. *Illinois*, *supra*, at 517-518, left the question open due to insufficient scientific data where it was stated:

"* * * We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was."

Appellant now suggests that scientific data indicates that death-qualified juries, that is, juries whose members do not include individuals excused under *Witherspoon*, *supra*, are prone to convict. It is appellant's contention that the question reserved in *Witherspoon* may now be answered by adopting a *per se* rule against death-qualifying a jury prior to the guilt phase of a bifurcated capital prosecution. We reject appellant's contention for the following reasons.

In *Keeten* v. *Garrison* (C.A. 4, 1984), 742 F. 2d 129, the identical argu-

[9] The United States Supreme Court, on October 2, 1984, heard arguments in *Wainwright* v. *Witt*, No. 83-1427, certiorari granted (1984), ... U.S. ..., 80 L. Ed. 2d 551, which presented, *inter alia*, questions concerning the application of *Witherspoon* v. *Illinois*, *supra*. While we certainly are unable to anticipate the holding in *Witt*, or what pronouncement might result, we are nevertheless confident that unless the Supreme Court overrules *Witherspoon*, the jurors excluded herein were dismissed in accord with the established principles of selecting a jury in a capital prosecution.

as to the potential for rehabilitation of death row inmates. Third, the court refused requested funds to obtain the expert testimony of Dr. Nemunaitis, a specialist in the rehabilitation of paraplegics. Nemunaitis had never examined or evaluated appellant, but would have testified as to the specific physical problems faced by paraplegics. He would also have testified that paraplegics have a shorter life expectancy which would be further reduced under conditions of imprisonment.

We agree that this testimony was clearly irrelevant. Bailey and McClendon would have testified regarding issues directed to the philosophy behind capital punishment, generally, as opposed to anything directly related to appellant. Indeed, we believe admission of this type of evidence would divert the jury from its duty to impose a sentence within the confines of the guidelines fixed by statute and turn its attention to the wisdom of enacting it in the first place. That is a matter within the province of the General Assembly. Similarly, Nemunaitis' testimony would have offered no insight into the character of appellant or the circumstances of this offense. Other evidence at trial established that appellant is a paraplegic as the result of a gunshot wound he received during the exchange of gunfire with Officer Johnson. Since Nemunaitis had never examined or evaluated appellant, we fail to see any relevance of his testimony to appellant. As the United States Supreme Court has stressed, "[w]hat is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Zant* v. *Stephens, supra* (77 L. Ed. 2d), at 251; *Barclay* v. *Florida, supra* (77 L. Ed. 2d), at 1149.

The court also excluded, as incompetent hearsay, the testimony of Loretta T. Jenkins, appellant's wife, to the effect that sometime after the offense she learned that Lester Jordan had allegedly threatened harm against her to appellant in order to induce appellant to participate in the bank robbery. The testimony was offered to show that appellant had acted under duress in committing the robbery and was manipulated by Jordan. The substance of this testimony was not corroborated by any other witness, but was mentioned by appellant in his statement to the jury. The court refused to allow this testimony for the reason that Mrs. Jenkins had no personal knowledge of the threats but had heard about them after the crime. Mrs. Jenkins was permitted to testify that she perceived appellant to be somewhat protective of her prior to the offense.

It is uncontroverted that this testimony was hearsay and outside the personal knowledge of the witness and thus inadmissible under Evid. R. 802 and 602. We recognize that " 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.' " *Green* v. *Georgia* (1979), 442 U.S. 95, 97, quoting *Chambers* v. *Mississippi* (1973), 410 U.S. 284, 302. However, we find none of the indicia of reliability which the court found compelling in overriding the evidentiary defects of testimony sought to be admitted in *Green* v. *Georgia, supra*. In *Green*, two defendants were

tried separately for the murder of one person (*id.* at 95), the prosecution's theory being that each defendant had fired one shot into the victim. *Id.* at 96, fn. 2. It was offered by hearsay testimony that Green's accomplice had admitted to firing both shots. *Id.* Further, the disputed testimony had been admitted at the accomplice's trial. *Id.* Thus, the court found:

"* * * [S]ubstantial reasons existed to assume its reliability. Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it." *Id.* at 97.

Here, the statement was not made by the accomplice, and was not corroborated, but was discovered by appellant's wife after the crime, and thus we find no compelling reason to disregard application of the Rules of Evidence. The trial court correctly excluded this evidence.

Appellant also contends that the trial court erred in instructing the jury not to consider sympathy for the accused in making its recommendation as to sentence.

Appellant essentially contends that by instructing the jury not to consider sympathy, the court implicitly instructed the jury not to consider the evidence offered in mitigation.

Specifically at issue is the following instruction by the trial court:

"You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence to decide all disputed questions of fact, to apply the instructions of the Court to your findings, and to render your verdict accordingly.

"In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried."

This instruction was given at the end of the charge. Earlier, the judge had specifically instructed the jury to consider evidence in mitigation, stating:

"* * * Mitigating factors are factors that, while they do not justify or excuse the crime, nevertheless, in fairness and mercy, may be considered by you as extenuating or reducing the degree of the defendant's blame or punishment."

The judge then enumerated all of the factors outlined in R.C. 2929.04(B), and explained the process of weighing mitigating factors against aggravating circumstances defined by statute.

Appellant relies on authorities from other states which prohibit the trial court from instructing the jury at the sentencing phase of a capital

case not to consider mercy, sympathy or compassion for the accused in reaching their verdict. See *People* v. *Easley* (1983), 34 Cal. 3d 858, 671 P. 2d 813; *Legare* v. *State* (1983), 250 Ga. 875, 302 S.E. 2d 351. It is the opinion of these courts that this charge could mislead the jury despite a correct charge as to mitigating factors.

We do not share the view that this instruction should be given enhanced significance over the charge as a whole and over the court's specific charge as to mitigation. To the contrary, we believe this instruction should be viewed in the context in which it is given. See *State* v. *Watson* (La. 1984), 449 So. 2d 1321, 1331-1332.

The instruction to the jury in the penalty phase of a capital prosecution to exclude consideration of bias, sympathy or prejudice is intended to insure that the sentencing decision is based upon a consideration of the reviewable guidelines fixed by statute as opposed to the individual juror's personal biases or sympathies. We believe the instruction adequately conveys this purpose by using the term "sympathy" together with the terms "bias" and "prejudice." When read in conjunction with a correct instruction as to mitigation, as was the case here, the jury is directed to focus on the guidelines set forth by statute.

We think this direction is necessary and entirely consistent with the view expressed by the United States Supreme Court in *Barclay* v. *Florida, supra*, at 1144, that, "[t]he thrust of our decisions on capital punishment has been 'that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' *Zant* v. *Stephens*, ___ U.S. ___, * * * 77 L. Ed. 2d 235 * * * (1983), quoting *Gregg* v. *Georgia*, 428 U.S. 153, 189 * * * (1976) (opinion of Stewart, Powell, and Stevens, JJ.)."

Accordingly, this argument is without merit.

IV

Appellant also challenges the trial court's denial of certain requests for funding to obtain expert assistance. Appellant, an indigent, argues that the denial of funding for expert assistance was in violation of R.C. 2929.024 and amounted to a denial of his right to effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.

R.C. 2929.024 provides, in relevant part:

"If the court determines that the defendant is indigent and that investigation services, experts, or other services are reasonably necessary for the proper representation of a defendant charged with aggravated murder at trial or at the sentencing hearing, the court shall authorize the defendant's counsel to obtain the necessary services for the defendant, and shall order that payment of the fees and expenses for the necessary services be made in the same manner that payment for appointed counsel is made * * *." Thus, R.C. 2929.024 requires the court to provide an in-

digent defendant with expert assistance whenever, in the sound discretion of the court, the services "* * * are reasonably necessary for the proper representation of a defendant charged with aggravated murder * * *."

The extent to which the provision of expert assistance to an indigent defendant is constitutionally required has not been established. However, in *Britt* v. *North Carolina* (1971), 404 U.S. 226, at 227, while expressly declining to define the outer limits of the rule, the court reaffirmed the principle established in *Griffin* v. *Illinois* (1956), 351 U.S. 12, that "* * * the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." In *Britt*, the court was confronted with the issue of whether the petitioner had been improperly denied a copy, at state expense, of the transcript of proceedings from his first trial which resulted in a deadlocked jury, for use at his second trial. The two factors which the court considered in determining whether the transcript was necessary were "* * * (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript." *Id.* The court concluded that the transcript was valuable to the defendant for use in his second trial, but upheld the denial of its provision at state expense because the evidence established that the court reporter would have read back to counsel the notes from the mistrial had he been requested to do so. *Id.* at 228-229.

While the assistance sought by appellant is not a transcript, we believe a standard comparable to that employed in *Britt* would serve as well to determine whether the trial court abused its discretion in denying a funding request for expert assistance under R.C. 2929.024. Tailoring the considerations to the inquiry necessary under R.C. 2929.024, the factors to consider are (1) the value of the expert assistance to the defendant's proper representation at either the guilt or sentencing phase of an aggravated murder trial, and (2) the availability of alternative devices that would fulfill the same functions as the expert assistance sought.

Specifically, appellant sought funding for a sociologist to assist at the hearing challenging death-qualified juries. This expert would have been employed to provide sociological data to support appellant's argument that the use of death-qualified juries results in unfair sentencing. (See Part II, *supra*.) Appellant also sought the services of a social scientist to assist in jury selection who would have provided counsel with advice as to the significance of a potential juror's body language, voice inflection, etc. Lastly, appellant requested expert assistance for purposes of his change-of-venue motion based on pretrial publicity. Appellant asserts that expert testimony would have supported his argument that pretrial publicity prevented a fair trial in Cleveland, but does not specify what that testimony would have been.

Applying the factors we enumerated above to the specific requests

The use in the penalty phase of both these special circumstance allegations thus artificially inflates the particular circumstances of the crime and strays from the high court's mandate that the state 'tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.' (*Godfrey* v. *Georgia* [1980], 446 U.S. 420 at p. 428. * * *) The United States Supreme Court requires that the capital-sentencing procedure must be one that 'guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.' (*Jurek* v. *Texas* [1976], 428 U.S. 262, at pp. 273-274 * * *.) That requirement is not met in a system where the jury considers the same act or an indivisible course of conduct to be more than one special circumstance." *Id.* at 798.

In *Provence* v. *State* (Fla. 1976), 337 So. 2d 783, certiorari denied (1977), 431 U.S. 969, the Florida Supreme Court rejected the application of two aggravating circumstances (*i.e.*, murder during a robbery and murder for pecuniary gain), stating:

"* * * [I]n some cases, such as where a larceny is committed in the course of a rape-murder, * * * [the circumstances] refer to separate analytical concepts and can validly be considered to constitute two circumstances[.] [H]ere, as in all robbery-murders, both subsections refer to the *same aspect* of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged." (Emphasis *sic*.) *Id.* at 786.

In *State* v. *Goodman* (1979), 298 N.C. 1, 257 S.E. 2d 569, the Supreme Court of North Carolina also struck down the use of duplicative special circumstances. The circumstances at issue included "avoiding or preventing lawful arrest," and that the "capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." The court concluded that the submission of both circumstances to the jury resulted "in an automatic cumulation of aggravating circumstances against the defendant." *Id.* at 29. See, also, *People* v. *Brownell* (1980), 79 Ill. 2d 508, 404 N.E. 2d 181; *Cook* v. *State* (Ala. 1978), 369 So. 2d 1251; *State* v. *Rust* (1977), 197 Neb. 528, 250 N.W. 2d 867.

Having reviewed the aforementioned authorities, we first examine whether any unnecessary duplication was present under specifications one and four. R.C. 2929.04(A)(3) sets forth an aggravating circumstance when "[t]he offense was committed for the purpose of escaping * * * apprehension * * * for another offense committed by the offender." In the same vein, R.C. 2929.04(A)(7) provides an aggravating circumstance if "[t]he offense was committed while the offender was * * * fleeing immediately after committing or attempting to commit * * * aggravated robbery

The overlap or duplication occurs in view of the likelihood that in most felony murders, death occurs while the offense is being committed or while fleeing from the scene in order to facilitate escape or to prevent apprehension. In fact, this precise situation occurred in the present case. Thus, under these circumstances, a defendant would likely be charged and convicted of a specification under R.C. 2929.04(A)(7). However, since the specification contained within R.C. 2929.04(A)(3) applies to many factual situations likely to arise in connection with a felony murder, unnecessary duplication occurs.

This is not to say that under circumstances different than those presented here, a capital defendant could not be convicted of an aggravating circumstance under R.C. 2929.04(A)(3), as well as R.C. 2929.04(A)(7). In the present case, however, these multiple aggravating circumstances were applied at the sentencing phase in an overzealous manner to the same act or indivisible course of conduct. Accordingly, we apply the doctrine of merger[16] and conclude that in weighing aggravating circumstances and mitigating factors, the specification under R.C. 2929.04(A)(3) should merge with the specification set forth under R.C. 2929.04(A)(7).[17]

In addition, we also agree with appellant that under the facts of this case the submission of two aggravating circumstances under R.C. 2929.04(A)(7), for the commission of aggravated murder in the course of a kidnapping and in the course of aggravated robbery, was unnecessarily cumulative.

In *State* v. *Logan* (1979), 60 Ohio St. 2d 126 [14 O.O.3d 373], this court was confronted with the question of when a defendant may be convicted of kidnapping[18] and another offense of the same or similar kind in conjunction with Ohio's multiple-count statute. The guidelines set forth in the syllabus are as follows:

"(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus suffi-

[16] Cf. *State* v. *Botta* (1971), 27 Ohio St. 2d 186, 201 [56 O.O.2d 119], for an application of the doctrine of merger in a criminal context.

[17] In reaching this result, we are guided by principles espoused in considering the doctrine of merger under R.C. 2941.25, Ohio's multiple-count statute.

[18] As is pertinent to the instant case, R.C. 2905.01 provides:

"(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where he is found or restrain him of his liberty, for any of the following purposes:

"(1) To hold for ransom, or as a shield or hostage;

"(2) To facilitate the commission of any felony or flight thereafter;

"(3) To terrorize, or to inflict serious physical harm on the victim or another;

"(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against his will;

"(5) To hinder, impede, or obstruct * * *."

made by appellant, we conclude that the trial court properly denied funding for these witnesses.

The sociological data with regard to death-qualified juries was available by way of studies and reports that were reduced to writing and available to appellant. These are part of the record in this case and an additional expert to testify at the hearing would not have added anything of significance to this data.

There is also nothing to support appellant's contention that the services of a social scientist would have been valuable to aid counsel in jury selection, or to establish the effects of pretrial publicity. The experts sought here would have been no more than consultants to counsel as opposed to sources of evidence relevant to disputed factual issues.

The authority relied upon by appellant from other jurisdictions is inapposite, because the expert testimony sought in those cases did relate to disputed factual matters. See *Williams* v. *Martin* (C.A. 4, 1980), 618 F. 2d 1021 (medical evidence concerning the victim's cause of death); *Hintz* v. *Beto* (C.A. 5, 1967), 379 F. 2d 937; and *Bush* v. *McCollum* (N.D. Tex. 1964), 231 F. Supp. 560, affirmed (C.A. 5, 1965), 344 F. 2d 672 (psychological evaluations of defendant where the sanity of the accused was an issue); *United States* v. *Durant* (C.A. 2, 1976), 545 F. 2d 823 (expert fingerprint witness where fingerprint evidence was pivotal).

Requests comparable to appellant's have been denied in other jurisdictions. See *United States* v. *Harris* (C.A. 7, 1976), 542 F. 2d 1283, certiorari denied *sub nom. Clay* v. *United States* (1977), 430 U.S. 934 (clinical psychologist to aid in jury selection and urban sociologist); *State* v. *Greenawalt* (1981), 128 Ariz. 150, 624 P. 2d 828, certiorari denied (1981), 454 U.S. 882 (public opinion pollster regarding change of venue); *State* v. *Smith* (1979), 123 Ariz. 231, 599 P. 2d 187 (jury selection and pretrial publicity experts).

Accordingly, this argument is without merit.

V

Appellant's next contention focuses upon whether the aggravating circumstances of which he was convicted overlap and, if so, whether such a practice artificially inflates the aggravating circumstances so as to deviate from the Supreme Court's holding in *Godfrey* v. *Georgia* (1980), 446 U.S. 420, that states must tailor and apply death penalties in order to avoid arbitrary and capricious sentences.

Appellant was charged and convicted of five aggravating circumstances, all of which were employed at the sentencing phase of his trial. Those specifications are summarized as follows:

(1) R.C. 2929.04(A)(3)[19] — the defendant committed the offense for the purpose of escaping apprehension for aggravated robbery.

[19] R.C. 2929.04(A)(3) sets forth an aggravating circumstance when "[t]he offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender."

(2) R.C. 2929.04(A)(5)[20] — the offense was part of a course of conduct involving the purposeful killing of, or attempt to kill, two or more persons (*i.e.*, Officers Johnson and Myhard).

(3) R.C. 2929.04(A)(6)[21] — the victim of the aggravated murder was a peace officer whom the defendant knew to be such, and who was engaged in his duties at the time.

(4) R.C. 2929.04(A)(7)[22] — the defendant committed the aggravated murder while he was committing or fleeing immediately after committing or attempting to commit aggravated robbery.

(5) R.C. 2929.04(A)(7) — the defendant committed the aggravated murder while he was committing or fleeing immediately after committing or attempting to commit kidnapping.

Appellant contends that specifications one and four, as well as four and five, are duplicative. Appellant recognizes that the presentation of overlapping aggravating circumstances at the guilt phase of a capital trial is allowable[23]; however, when a jury is charged under R.C. 2929.03 with the responsibility of weighing aggravating circumstances and mitigating factors, appellant argues that duplicative aggravating circumstances inflate the weighing process in favor of the state. Thus, appellant charges that the state, by overlapping aggravating circumstances at the sentencing stage of a capital case, unfairly increases the likelihood of a death recommendation.

In *People* v. *Harris* (1984), 36 Cal. 3d 36, 201 Cal. Rptr. 782, 679 P. 2d 433, the Supreme Court of California addressed overlapping aggravating circumstances, which included the intent to commit larceny and robbery, as follows:

[20] The aggravating circumstance provided under R.C. 2929.04(A)(5) provides:

"Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender."

[21] The aggravating circumstance contained under R.C. 2929.04(A)(6) states:

"The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer."

[22] R.C. 2929.04(A)(7) creates an aggravating circumstance if:

"The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design."

[23] Appellant's counsel concedes in his brief that the state may present alternative aggravating circumstances at the guilt phase of a capital case:

"The state claims it should be permitted to advance alternate theories in support of conviction. However, that argument is valid only at the guilt phase where they must provide factual proof of the offense(s) committed. * * *"

cient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;

"(b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions."

As the *Logan* court recognized, the critical consideration "is whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense." *Id.* at 135. Cf. *State* v. *Price* (1979), 60 Ohio St. 2d 136, at 143 [14 O.O.3d 379].

Our review of the record leads us to conclude that although appellant did aim his firearm at various individuals inside the bank,[29] as well as order other persons therein to the rear of the building, such restraint or movement of the victims was incidental to the separate underlying circumstance under R.C. 2929.04(A)(7), of committing aggravated murder during the course of an aggravated robbery.

Accordingly, we conclude that specifications one and five are unnecessarily cumulative and, therefore, should be merged into specification number four. Nevertheless, our conclusion, which leaves undisturbed specifications two, three and four, does not, in and of itself, necessitate that appellant be resentenced.

In *Zant* v. *Stephens*, *supra*, the Georgia Supreme Court had struck down as unconstitutionally vague one of three aggravating circumstances considered by the jury in the defendant's capital trial.[30] In spite of this action, the Georgia court did not order the defendant to be resentenced. Instead, the court concluded that since the evidence concerning the defective

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[29] As observed in *Logan*, *supra*, to constitute kidnapping under R.C. 2905.01, no movement is required. Rather, restraint by force, threat or deception is all that need be demonstrated. Thus, implicit within every robbery (and aggravated robbery) is a kidnapping. *Id.* at 130.

[30] Section 27-2534.1(b) of the Georgia Code provided, in part:

"In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

"(1) The offense of murder * * * was committed by a person who has a substantial history of serious assaultive criminal convictions."

This portion of subsection (b)(1) was found to be unconstitutionally vague in *Arnold* v. *State* (1976), 236 Ga. 534, 224 S.E. 2d 386, as later applied in *Stephens* v. *State* (1976), 237 Ga. 259, 227 S.E. 2d 261, certiorari denied (1976), 429 U.S. 986.

aggravating circumstance was otherwise admissible, and since the verdict was adequately supported by the evidence, resentencing was not required.

Upon review, the United States Supreme Court affirmed. The court specifically looked to the admissibility of the evidence absent its designation as an aggravating circumstance, and the scope of the mandatory review provided by the Georgia Supreme Court in determining the propriety of the sentence. Since the evidence was otherwise admissible and the Georgia Supreme Court had reviewed the sentence in order to guard against arbitrariness and to assure proportionality, the United States Supreme Court did not vacate the sentence. As noted by Justice Rehnquist in his concurring opinion: "[w]hatever a defendant must show to set aside a death sentence, the present case involved only a remote possibility that the error had any effect on the jury's judgment; the Eighth Amendment did not therefore require that the defendant's sentence be vacated." *Id.* at 267.[31]

As in *Zant*, the evidence supporting the merged aggravating circumstances in the present case was clearly admissible. Moreover, like the Georgia Supreme Court, the scope of mandatory review provided by this court in capital cases is extensive in order to guard against arbitrary, capricious and disproportionate sentencing. Specifically, under R.C. 2929.05(A), our function parallels that of a jury when the sentence of death is imposed, in that we are bound to "* * * independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate." Equally important is the fact that in his charge to the jury, the trial judge herein made no suggestion that "the presence of more than one aggravating circumstance should be given special weight." *Id.* at 258.

We therefore conclude that although two of the aggravating circumstances should have been merged into the remaining three circumstances, this does not, standing alone, require that appellant's sentence be set aside. Any remote possibility of error that this had upon the jury's judgment can be guarded against when this court undertakes its responsibility (*infra* at Part VII), to weigh all of the evidence and determine whether the remaining three aggravating circumstances which ap-

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[31] In addressing a similar situation in *White* v. *State* (Fla. 1984), 446 So. 2d 1031, 1037, wherein the trial court had erroneously doubled two aggravating circumstances, the Supreme Court of Florida sustained the sentence of death based upon the remaining aggravating factors, stating:

"When there are one or more valid aggravating factors which support a death sentence, in the absence of any mitigating factor(s) which might override the aggravating factors, death is presumed to be the appropriate penalty. *White* v. *State*, 403 So. 2d 331 (Fla. 1981), *cert. denied*, ___ U.S. ___, * * * 77 L. Ed. 2d 1412 (1983); *State* v. *Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, * * * 40 L. Ed. 2d 295 (1974)."

pellant was found guilty of committing outweigh the mitigating factors present in the case.

Accordingly, in the penalty phase of a capital prosecution, where two or more aggravating circumstances arise from the same act or indivisible course of conduct and are thus duplicative, the duplicative aggravating circumstances will be merged for purposes of sentencing. Should this merging of aggravating circumstances take place upon appellate review of a death sentence, resentencing is not automatically required where the reviewing court independently determines that the remaining aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt and that the jury's consideration of duplicative aggravating circumstances in the penalty phase did not affect the verdict.

VI

Appellant next challenges that the trial court's jury instruction, as to the binding effect of a death penalty sentence compared to a sentence of life imprisonment, unfairly biased the jury in favor of returning a death penalty verdict in violation of the Eighth and Fourteenth Amendments to the United States Constitution, as well as Sections 5 [*sic*] and 16, Article I of the Ohio Constitution.

As is apparent from a reading of R.C. 2929.03(D)(2),[32] a jury's determination to impose life imprisonment with parole eligibility after defendant's serving either twenty or thirty full years is binding upon the trial court. On the other hand, a jury verdict imposing the death penalty is advisory to the extent that under R.C. 2929.03(D)(3)[33] the trial court has the

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[32] R.C. 2929.03(D)(2) provides:

"Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

"If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section."

[33] R.C. 2929.03(D)(3) provides:

"Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to

responsibility to independently weigh the evidence in order to determine whether the aggravating circumstances outweigh mitigating factors.

In view of the statutory framework, the trial court charged the jury as follows:

"A jury recommendation to the Court that the death penalty be imposed is just that, a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the appellant rests upon this Court.

"In the final analysis, after following the procedures and applying the criteria set forth in the statute, I, the judge, will make the decision as to whether the defendant, Leonard Jenkins, will be sentenced to death or to life imprisonment."

Appellant objects to this instruction, arguing that it diminished the jury's responsibility, thereby encouraging a death penalty recommendation so as to obtain judicial review thereof. Although recognizing the role of a judge in reviewing a jury's death penalty recommendation, appellant contends it constitutes reversible error to so inform the jury absent a statutory directive.

In support of this contention appellant principally relies upon *Wiley* v. *State* (Miss. 1984), 449 So. 2d 756, and *Williams* v. *State* (Miss. 1984), 445 So. 2d 798. Although in each of these cases death sentences were reversed, in part, upon prosecutorial references to further review, the court was careful to point out in its decisions that reversal was predicated upon state law principles in accordance with the decision in *California* v. *Ramos* (1983), ___ U.S. ___, 77 L. Ed. 2d 1171.

In *Ramos*, the trial court was required by statute to instruct the jury that the Governor had the authority to commute a life sentence without parole, so that parole would indeed be possible.[34] Although the Governor

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division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

"(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

"(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment."

[34] The instruction, referred to as the "Briggs Instruction," was incorporated pursuant to voter initiative into Cal. Penal Code Ann. Section 190.3. At trial in *Ramos*, the judge charged the jury under the Briggs Instruction as follows:

" 'You are instructed that under the State Constitution a Governor is empowered to grant a reprieve, pardon, or commutation of a sentence following conviction of a crime.

" 'Under this power a Governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.' " *California* v. *Ramos* (1983), ___ U.S. ___, 77 L. Ed. 2d 1171, 1177.

the jury, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors."

For purposes of establishing factors in mitigation, three witnesses testified and appellant made a statement on his own behalf.

The first witness to testify for purposes of mitigation was Dr. Sandra B. McPherson, a clinical psychologist. Her testimony was based upon her professional evaluation of appellant which included psychological testing and personal interviews. McPherson testified that appellant had an I.Q. of 63 and a mental age of 9.5 years. At this intellectual range, she testified that appellant could be classified as "educable mentally retarded." McPherson testified that although appellant's I.Q. was in the stated range, he "could be expected to learn those materials which are necessary for survival in the society and would be able to read and write, for example, although the expectation would be that performance would not exceed a sixth grade level." Upon cross-examination, she admitted that appellant's intellectual capacity did not preclude him from being able to consider the import of his conduct or refrain from shooting upon realizing the police had arrived at the scene of the bank robbery.

Appellant's wife and mother also testified at the sentencing hearing. They both testified as to their perceptions that appellant was of below average intelligence. In addition, appellant's mother testified that during childhood appellant was subject to abuse from an alcoholic father and was given little guidance because his parents were infrequently home. McPherson testified that the lack of a supportive home environment could have prevented appellant from developing his intellectual capabilities. She did not suggest that appellant had any aggressive tendencies as a result of abuse during childhood.

Appellant's wife also testified that appellant was unable to tend to his own personal hygiene and likely to seek leadership from her as well as from others he knew. Although specific testimony as to alleged threats against her by Jordan was precluded, Loretta Jenkins testified that shortly before the offense appellant's attitude had changed and he was much more protective of her.

Appellant also made a statement in his own behalf, to the effect that he was remorseful and that he only became involved in the robbery as the result of coercion by Jordan.

Based upon this evidence, the trial judge specifically enumerated and considered the following factors in mitigation:

"(1) The nature and circumstances of the offense, the history, character and background of the defendant, Leonard Jenkins;

"(2) The defendant's level of intelligence and how that affected his judgment to get involved in the criminal activity;

"(3) The defendant's level of intelligence and how that affected his judgment inside and outside the bank on the day of the offense, to-wit: October 21, 1981;

"(4) The defendant's relative chronological and psychological age;

"(5) The defendant's family upbringing and whether that affected his ability to make decisions and to project into the future;

"(6) That while the defendant, Leonard Jenkins, did not act in self-defense, his conduct was prompted by the natural instinct of self-preservation;

"(7) That the defendant, Leonard Jenkins, was caused to act as he did as a result of an implied threat upon the life of the defendant's wife, Loretta Jenkins;

"(8) That the defendant, Leonard Jenkins' course of conduct on October 21, 1981, was not the product of careful decision-making and prolonged deliberation of all the information available to him and was without great intellectual insight."

The court considered items two, three and four together, all of which concerned the effect of appellant's low intelligence as a mitigating factor. In this regard, the court noted that appellant's intellectual capacity was not such as to render him incapable of forming intent or realizing the import of his conduct. In determining the weight to be given the evidence of appellant's low intelligence, the court considered appellant's conduct during the bank robbery. It was established that during the robbery, appellant unilaterally, and without direction from Jordan, disarmed the bank's security guard and held the tellers and customers at gunpoint while Jordan proceeded to collect money from the tellers' cash drawers. The trial court stated in its opinion, "* * * eighteen witnesses testified as to Leonard Jenkins' conduct in the bank during the course of the bank robbery, and everyone in effect pictured him as an aggressive, take-charge type of bank robber, waving a cocked gun and threatening the tellers with obscenities. Not one described him as a meek, submissive, dull-witted, overgrown boy being led or directed by a dominating associate through the intricate procedures of robbing a bank."

Moreover, when the police appeared at the door of the bank, several witnesses testified that appellant made statements to the effect that the police were there and that he would shoot his way out. He then proceeded to do just that while Jordan calmly surrendered.

The court concluded that it found no "* * * direct or positive correlation between the defendant's I.Q. * * * and his ability to successfully rob a bank and his responsibility for killing a police officer while effectuating his escape."

The court also considered items one and five together which considered appellant's background, including his family upbringing, and character. The evidence relevant to these factors was largely the testimony of appellant's wife and mother, whose objectivity the judge questioned. Moreover, since most of their testimony involved their perceptions of appellant's low intelligence and characterization of him as a follower, that was also discounted in view of his conduct during the robbery. Similarly, appellant's childhood experiences were given little weight

could also commute a death sentence, this fact was not made known to the jury. The defendant challenged this scheme, arguing before the United States Supreme Court that the instruction had a significant impact upon the jury's determination, thus leading to the imposition of a death sentence in order to foreclose the possibility of parole.

The instruction was, however, upheld. The court stated that, "* * * the State is constitutionally entitled to permit juror consideration of the Governor's power to commute a life sentence. This information is relevant and factually accurate and was properly before the jury." *Id.* at 1188. Continuing, the court recognized that such an instruction "* * * does not preclude individualized sentencing determinations or consideration of mitigating factors, nor does it impermissibly inject an element too speculative for the jury's deliberation." *Id.* The court concluded that although the instruction is not prohibited by the Eighth and Fourteenth Amendments, states are free to provide greater protections under state law principles.

This conclusion was echoed by the Supreme Court of Mississippi in *Wiley* and *Williams*, *supra*, when the court recognized that in reviewing the propriety of arguments which mention the subject of further review, states are free to elect several alternatives.[13] Reference may be made to the subject of further review, "so long as what is said is accurate and correct." *Williams*, *supra*, at 811, citing *California* v. *Ramos*, *supra*.

Under Mississippi jurisprudence, the court in *Wiley* and *Williams* set forth the rule that in a death penalty case the jury should never be advised that their decision can be subsequently corrected, and any reference to the contrary constitutes reversible error.[14] Although cognizant of the competing interests which led the court to this conclusion, we decline to take such a giant step and adopt a *per se* rule in this regard. While we prefer that in the future no reference be made to the jury regarding the finality of their decision, we are unable to conclude that the Ohio Constitution

[13] As the court in *Wiley* observed, *Ramos* "expressly reserved to the individual states the right to determine what post-sentencing matters are properly placed before a jury." *Id.* at 761-762.

[14] In reaching its decisions in *Wiley* and *Williams*, the court placed great reliance upon its prior decision in *Howell* v. *State* (Miss. 1982), 411 So. 2d 772. In *Howell*, the prosecuting attorney stated five times in closing argument that the jury's verdict was not final, and that the defendant would have the opportunity to seek appellate review. When the statement was first made it was objected to by defense counsel and sustained by the court. Nevertheless, the prosecuting attorney repeated the statement four additional times over defense counsel's objections. In addition, the prosecuting attorney *incorrectly* stated that "if he appeals * * * he [the defendant] has the right to be out on bond * * *." *Id.* at 773. Upon these facts, the court in *Howell* concluded that the defendant did not receive a fair trial.

Aside from the egregious conduct of the prosecutor in repeatedly making a statement which was objected to and sustained, thus denying the defendant a fair trial, the *Howell* case is also distinguishable from the instant cause in view of the prosecutor's inaccurate statements of the law and references to appellate review.

somehow provides greater protection against these remarks than the protections afforded under the Eighth and Fourteenth Amendments as discussed in *Ramos*.[13] Instead, we find persuasive the rationale of Justice Roy N. Lee in his dissent in *Wiley*, where he stated:

"I think that we must examine each record as it comes before us to determine whether or not on that record the * * * [defendant] has received a fair trial and, on the particular point here, whether or not remarks or statements * * * have resulted in prejudice to * * * [the defendant] to the extent that he did not obtain a fair trial." *Id.* at 765.

Having examined the trial court's charge to the jury herein, it is readily apparent that the portion of the charge to the jury under consideration was an accurate and correct statement of Ohio law,[14] in accordance with *Ramos*. Accordingly, the jury in the penalty phase of a capital prosecution may be instructed that its recommendation to the court that the death penalty be imposed is not binding and that the final decision as to whether the death penalty shall be imposed rests with the court, so long as such instruction does not result in a prejudice denying the defendant a fair trial. Upon examination of the entire record, we conclude that the charge did not result in a prejudice to the appellant which requires that he be resentenced.

VII

We turn now to our review of the sentencing phase of appellant's trial. R.C. 2929.05(A) defines the scope of our review where the penalty of death has been imposed, and provides in part:

"* * * [T]he court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues of the case * * * shall review the judgment in the case and the sentence of death imposed * * * shall review and independently weigh all of the facts and other evidence disclosed in the record * * * consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of com-

[13] On remand from the Supreme Court's decision in *Ramos*, the Supreme Court found the Briggs Instruction to be violative of the Due Process Clause of the California Constitution. See *People* v. *Ramos* (1984), 37 Cal. 3d 136, 207 Cal. Rptr. 800, 689 P. 2d 430. The court concluded that the instruction invites the jury to improperly speculate upon the actions of the present or future Governor when considering whether to impose a sentence of death.

[14] See fns. 32 and 33, *supra*.

In the case at bar, evidence of the two duplicative aggravating circumstances was admissible for purposes of the guilt phase of trial. Moreover, the same evidence which established the duplicative aggravating circumstances also establishes one of the remaining aggravating circumstances, i.e., that the offense occurred during the commission of or upon fleeing from an aggravated robbery. Indeed, the two circumstances have been merged as being duplicative (see Part V, *supra*), as opposed to being constitutionally or statutorily invalid.

We also note that only one aggravating circumstance need be proven to subject appellant to the possibility of a sentence of death. Here, despite our merger, three aggravating circumstances remain which have been proven beyond a reasonable doubt. In view of our determination, as well as that of the courts below, that the mitigating factors do not outweigh the aggravating circumstances, we cannot conclude that the merger of two aggravating circumstances would have affected the balance struck by the courts below so as to require the vacation of the death penalty. To the contrary, we find that the three aggravating circumstances appellant was found guilty of committing outweigh, beyond a reasonable doubt, any evidence offered by way of mitigation.

VIII

R.C. 2929.05 requires this court and the court of appeals to determine whether the sentence of death is disproportionate to sentences imposed for similar crimes. This type of proportionality review "* * * purports to inquire * * * whether the penalty is nonetheless unacceptable in a particular case because [it is] disproportionate to the punishment imposed on others convicted of the same crime." *Pulley* v. *Harris*, *supra*, at 36. While statutory schemes employing proportionality review provisions have been favorably endorsed by the United States Supreme Court, they are not constitutionally mandated. *Id.* at 40.

To aid the courts in conducting their proportionality review under R.C. 2929.05, R.C. 2929.021[10] requires that certain information be pro-

[10] R.C. 2929.021 provides:

"(A) If an indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the clerk of the court in which the indictment is filed, within fifteen days after the day on which it is filed, shall file a notice with the supreme court indicating that the indictment was filed. The notice shall be in the form prescribed by the clerk of the supreme court and shall contain, for each charge of aggravated murder with a specification, at least the following information pertaining to the charge:

"(1) The name of the person charged in the indictment or count in the indictment with aggravated murder with a specification;

"(2) The docket number or numbers of the case or cases arising out of the charge, if available;

"(3) The court in which the case or cases will be heard;

"(4) The date on which the indictment was filed.

only three aggravating circumstances should have been considered in the sentencing decision below. These are first, that the offense was part of a purposeful killing of, or attempt to kill, two or more persons; second, that the victim of the aggravated murder was a peace officer whom the defendant knew to be such, and who was engaged in his duties at the time; and third, that the defendant committed the aggravated murder while he was committing or fleeing immediately after committing or attempting to commit aggravated robbery.

This error cannot be treated superficially. Ohio law provides that at each level of proceedings the aggravating circumstances must be weighed against the mitigating factors and only where the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt may the penalty of death be imposed. R.C. 2929.04 and 2929.05.

The United States Supreme Court has held that the improper consideration of an aggravating circumstance by the sentencer does not necessarily invalidate the imposition of a sentence of death. *Zant* v. *Stephens*, *supra*; *Barclay* v. *Florida*, *supra*. In each case, the sentencing court considered an improper aggravating circumstance which the state's highest courts held did not require vacation of the death penalty. In each case, the United States Supreme Court held that review of such a defect required an inquiry into "* * * the function of the finding of aggravating circumstances under * * * [state] law and * * * the reason why this aggravating circumstance is invalid." *Barclay*, *supra*, at 1145; *Zant*, *supra*, at 241-242.

The statutory framework in Florida discussed in *Barclay* is similar to Ohio's. Like in Ohio, the statute precluded consideration of non-statutory aggravating circumstances and required the sentencing court to weigh the mitigating factors against the aggravating circumstances. *Id.* at 1146.[9] In *Barclay*, at 1148, the court stated:

"The crux of the issue, then, is whether the trial judge's consideration of this improper aggravating circumstance so infects the balancing process created by the Florida statute that it is constitutionally impermissible for the Florida Supreme Court to let the sentence stand."

In *Barclay*, the sentencing court considered the defendant's criminal record as an aggravating circumstance although it was not defined as such by statute. In upholding the imposition of the death penalty despite the consideration of the improper aggravating circumstance, the court was persuaded by the fact that the evidence of the defendant's record was otherwise admissible (*id.*), and that in reviewing similar errors, the Florida Supreme Court did not mechanically apply a harmless error analysis (*id.* at 1147).

[9] The Georgia statute at issue in *Zant*, *supra*, did not prohibit consideration of non-statutory aggravating circumstances and did not require the sentencing court to weigh the aggravating circumstances against the mitigating factors.

vided to the Ohio Supreme Court with respect to capital indictments issued or dismissed. Also, under R.C. 2929.03(F), trial judges rendering opinions in capital cases are required to file copies of those opinions with their court of appeals and with the Ohio Supreme Court. R.C. 2929.05(A) also requires courts of appeals to file copies of their sentencing opinions with the Ohio Supreme Court. The purpose of these provisions is to provide the reviewing courts with some basis for reviewing the proportionality of the imposition of the death sentence in comparison with sentences entered in similar cases.

The court of appeals held that "* * * [t]he burden rests on counsel for the parties to advise this court about other cases from this district with which comparison is requested. This court has no duty to make independent investigative efforts in search of comparable or disparate sentences." This ruling is incorrect in light of the statutory framework just discussed for proportionality review. R.C. 2929.05 requires the review of the proportionality of death sentences regardless of whether counsel has provided evidence of disproportionality. Moreover, the court of appeals is required to determine for itself whether the sentence is disproportionate, at least when compared with those sentencing opinions filed with the court of appeals and the court of appeals' own prior decisions. This is the purpose for the statutory requirement that data relevant to other sentences imposed must be provided to the court of appeals.

Appellant urges that the judgment should be reversed in order for the court of appeals to conduct proportionality review and also to consider, in making that determination, the relative sentences imposed in non-capitally charged murder cases. R.C. 2929.05 does not require a comparison of sentences in non-capital murder cases for proportionality review, nor is a similar requirement imposed by the United States Constitution. See *Pulley* v. *Harris*, *supra*.

As to appellant's first request, the court of appeals' erroneous statements regarding proportionality review do not appear to warrant a

"(B) If the indictment or a count in an indictment charges the defendant with aggravated murder and contains one of more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the defendant pleads guilty or no contest to any offense in the case or if the indictment or any count in the indictment is dismissed, the clerk of the court in which the plea is entered or the indictment or count is dismissed shall file a notice with the supreme court indicating what action was taken in the case. The notice shall be filed within fifteen days after the plea is entered or the indictment or count is dismissed, shall be in the form prescribed by the clerk of the supreme court, and shall contain at least the following information:

"(1) The name of the person who entered the guilty or no contest plea or who is named in the indictment or count that is dismissed;

"(2) The docket numbers of the cases in which the guilty or no contest plea is entered or in which the indictment or count is dismissed;

"(3) The sentence imposed on the offender in each case."

X

Appellant next claims his due process rights were violated because the jury was not required to render a specific finding on the question of intent to kill at the guilt phase of the trial.[9]

Appellant argues that the plain language of R.C. 2903.01(D) requires a specific finding by the jury that "[n]o person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. * * *" The obvious purpose underlying this provision, however, is to avoid situations found so objectionable by the United States Supreme Court in *Lockett* v. *Ohio*, *supra* (438 U.S. 586), and *Enmund* v. *Florida*, *supra* (458 U.S. 782). In those cases, the defendants were sentenced to death even though they did not participate in the actual killing, lacked the specific intent to kill, and acted only as aiders and abettors to crimes other than murder. Consequently, we find that R.C. 2903.01(D) does not support appellant's claim.

Appellant alternatively contends that even if Ohio's aggravated murder statute is not found to expressly mandate a special verdict, that a special verdict must necessarily be implied.

This court has stated that "the function of the courts in reference to legislative enactments is to declare their meaning from what they say and not to interpret them in reference to what the courts may think they ought to say." *DeLong* v. *Campbell* (1952), 157 Ohio St. 22, 29 [47 O.O. 27].

That a special verdict was not within legislative contemplation is quite evident. At the time the General Assembly enacted R.C. 2903.01(D), it also passed R.C. 2929.03, which requires special findings by the jury with respect to aggravating circumstances. Where the legislature, in definitive language, provides for a special verdict in one statute and fails to so provide in another contemporaneously enacted statute, we can only conclude that no special verdict is required in the latter statute. In *Bernardini* v. *Bd. of Edn.* (1979), 58 Ohio St. 2d 1, at 4 [12 O.O.3d 1], we said: "In ascertaining the legislative intent of a statute, 'It is the duty of this court to give effect to the *words used* [in a statute], not to delete words used *or to insert words not used*.' * * *" (Emphasis *sic*.) To adopt appellant's theory would effectively insert words not used into R.C. 2903.01(D). It follows then, that since no special "intent to kill" verdict is called for in Ohio's capital punishment scheme, none is required.

[9] It is true, as appellant points out, that criminal statutes are to be "strictly construed against the state, and liberally construed in favor of the accused." R.C. 2901.04(A). And, appellant's contention about the jury's determination is also correct, *i.e.*, that "[t]he existence of an accused's purpose to kill must be found by the jury under proper instructions from the trial court and can never be determined by the court as a matter of law." *State* v. *Scott* (1980), 61 Ohio St. 2d 155 [15 O.O.3d 102], paragraph four of the syllabus. But, appellant makes no particular claim that the jury was not properly instructed with respect to this issue, neither is there any evidence that appellant's intent was determined by the court as a matter of law.

Accordingly, a capital defendant is not entitled to a special verdict on the question of intent to kill at the guilt phase of a capital prosecution.

XI

Appellant's next complaint focuses upon the trial court's jury instructions and jury form, utilized during the sentencing phase. While instructing the jury at the conclusion of the sentencing phase, the trial judge stated:

"After you retire, first select a foreman or forelady, and whenever all twelve of you — I repeat — all twelve jurors agree upon a verdict, you will sign the verdict in ink and advise the court of this fact. That applies to all verdict forms."

Subsequent to this charge, two verdict forms were provided to the jurors. One form provided for the sentence of death, and contained twelve signature lines. The other form provided for a life sentence with a blank space for the jury to impose either twenty or thirty years of imprisonment without parole. This form also contained twelve signature lines.

Appellant maintains that the trial court erroneously instructed the jury that unanimity was required in order to return a verdict imposing a life sentence. Appellant predicates this argument primarily upon his construction of R.C. 2929.03(D)(2) which provides, in relevant part:

"If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment."

In the first sentence above, referring to the imposition of a sentence of death, the statute requires a unanimous jury finding. However, when referring to the imposition of a life sentence, neither unanimity nor any other percentage of jurors is set forth. Appellant interprets this omission to mean that if the jury cannot unanimously agree on death, then the jury may return a life sentence absent unanimity. We disagree. The fallacy which immediately emerges under appellant's construction of R.C. 2929.03(D)(2) is that if something less than unanimity is allowed in returning a life sentence, what percentage will suffice?

The state, on the other hand, contends that any ambiguity present within R.C. 2929.03(D)(2) is easily resolved under Crim. R. 31(A). An examination of this rule, when read in conjunction with the foregoing statute, demonstrates that the state's contention is well-taken.

Crim. R. 31(A) provides:

"The verdict shall be unanimous. It shall be in writing, signed by all

reversal where this court must, under R.C. 2929.05, reconsider the issue of proportionality.

Since this is the first case we have reviewed under our death penalty statutes, we have no prior decisions for comparison. However, we have reviewed the sentencing opinions filed with this court and conclude that the penalty herein was not disproportionate to that imposed in similar situations.

In his argument that the sentence imposed herein was disproportionate appellant relies on statistical data that out of two hundred eighty capital indictments filed since the enactment of the death penalty statutes, only ten percent have led to the imposition of the death penalty. While this statistical data is of limited value for any purpose at this early stage in reviewing the imposition of the death penalty, we would derive the opposite conclusion from this data. We would construe it as demonstrating a conscious and serious effort by local jurisdictions to narrowly define the class of persons subject to the death penalty.

There is nothing which we have discovered in our review of death sentences imposed or raised in appellant's brief which suggests that the sentence in this case was imposed arbitrarily or freakishly as condemned in *Furman* v. *Georgia*, *supra* (408 U.S. 238).

IX

Appellant also challenges the trial court's instructions to the jury as to the state's burden of proof at both the guilt and penalty phases of trial. Appellant first argues that in a capital case, the state's burden should be "proof beyond all doubt" and that the jury must be so instructed. This argument is without merit. R.C. 2901.05(A) defines the burden of proof in all criminal proceedings and provides that "[e]very person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution." With particular reference to imposition of the death penalty, R.C. 2929.03(B) requires that the jury be instructed "* * * that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification * * *." Similarly, R.C. 2929.03(D)(1) provides that "* * * [t]he prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death." See, also, R.C. 2929.03(D)(2).

The constitutionality of requiring a burden of proof beyond a reasonable doubt in criminal proceedings has been firmly established. *In re Winship* (1970), 397 U.S. 358, 364 [51 O.O.2d 323]. There is no authority which holds that appellant's proposed burden of "*proof* beyond all doubt" is constitutionally mandated.

In its instructions to the jury, the trial court employed the definition of "reasonable doubt" contained in R.C. 2901.05(D) which provides:

"'Reasonable doubt' is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs."

Appellant argues that the statutory definition is inadequate and fails to convey the concept of reasonable doubt required by *In re Winship*, *supra*. We addressed an identical argument with respect to the language in R.C. 2901.05(D) in *State* v. *Nabozny* (1978), 54 Ohio St. 2d 195, 202-203 [8 O.O.3d 181], stating:

"* * * We are cognizant of the difficulty inherent in any attempt to define this abstract legal concept. The United States Supreme Court recognized this problem in *Miles* v. *United States* (1880), 103 U.S. 304, at page 312: 'Attempts to explain the term "reasonable doubt" do not usually result in making it any clearer to the minds of the jury.' Scrutiny of the definition provided by the General Assembly in R.C. 2901.05 reveals a substantial similarity to the explanation of 'reasonable doubt' upheld in *Holland* v. *United States* (1954), 348 U.S. 121. In *Holland*, *supra*, at page 140, the United States Supreme Court found, concerning 'reasonable doubt,' that 'the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some. * * *'

"The General Assembly has attempted, in R.C. 2901.05 and the definition of 'reasonable doubt' therein, to provide not only a degree of consistency as to the meaning of the term throughout the courts of this state, but also to have a definition comprehensible to all the members of the jury and not merely those trained in the subtle nuance of legalese. Considering the inherent difficulty in defining this abstract concept of reasonable doubt, the similarity of the definition under consideration with that in *Holland*, *supra*, and the beneficial aspects of the legislative mandated definition, we find that the General Assembly has pronounced a rational definition of 'reasonable doubt' which, when taken as a whole, correctly conveyed the concept of 'reasonable doubt' to the jury." (Footnote omitted.)

Consequently, the standard of proof in a capital prosecution is proof beyond a reasonable doubt as defined in R.C. 2901.05 and not proof beyond all doubt.

jurors concurring therein, and returned by the jury to the judge in open court."

Application of the foregoing rule to the cause *sub judice* resolves any ambiguity raised by appellant under R.C. 2929.03(D)(2), and is, without question, consistent with the scope and applicability of the Rules of Criminal Procedure.[44] Moreover, absent the application of Crim. R. 31(A), it is, nevertheless, well-recognized that when statutes allow a jury in a criminal proceeding to influence punishment, such as the recommendation of life imprisonment in place of death, and the statute fails to expressly authorize a nonunanimous vote, the jury cannot secure the lesser punishment absent unanimity. See Annotation (1965), 1 A.L.R. 3d 1461, at 1462.

Accordingly, we conclude that in returning a sentence of life imprisonment under R.C. 2929.03(D)(2), the jury's verdict must be unanimous.

XII

Appellant next contends that "[i]n the penalty phase of a capital case, the defendant shall have the right to open and close the final arguments because a capital defendant actually has the affirmative on the issue of whether he should be sentenced to death." Appellant bases this claim on R.C. 2929.03(D)(1),[45] which states, in pertinent part, that "[t]he defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death." Appellant further contends that R.C. 2315.01(C)[46] and 2315.01(F)[47] give him the right to open and close because he would be "[t]he party who would be defeated if no evidence were offered on either side." The state, on the other hand, argues that it should open and close final arguments during the penalty phase because R.C. 2929.03(D)(1) provides that the "prosecution shall

[44] Crim. R. 1, which sets forth the scope and applicability of the Rules of Criminal Procedure, provides in relevant part:

"(A) These rules prescribe the procedure to be followed in all courts of this state in the exercise of criminal jurisdiction, with the exceptions stated in subdivision (C) of this rule."

The seven exceptions enumerated in subdivision (C) are clearly inapplicable to the present case.

[45] R.C. 2929.03(D)(1) provides in part:

"The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death."

[46] R.C. 2315.01(C) provides:

"The party who would be defeated if no evidence were offered on either side, first, must produce his evidence, and the adverse party must then produce his evidence."

[47] R.C. 2315.01(F) provides in part:

"* * * The party required first to produce his evidence shall have the opening and closing arguments. * * *"

have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death."

In the case *sub judice*, at the conclusion of the penalty phase of the trial, the court permitted the state to open and close final arguments to the jury. We find no error in this for the following reasons.

R.C. 2945.10(F) provides that: "[w]hen the evidence is concluded * * * the counsel for the state shall commence, the defendant or his counsel follow, and the counsel for the state conclude the argument to the jury."

As stated in the third paragraph of the syllabus in *State* v. *Bayless*, *supra*: "Any decision to vary the order of proceedings at trial in R.C. 2945.10 is within the sound discretion of the trial court, and any claim that the trial court erred in following the statutorily mandated order of proceedings must sustain a heavy burden to demonstrate the unfairness and prejudice of following that order." Appellant has not met this burden.

We agree with appellant's assertion that the state cannot, in the sentencing phase, present proof of aggravating factors other than those of which the appellant was found guilty of committing in the guilt phase of the trial. R.C. 2929.03(D)(1). However, by that same statute, the "prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances * * * outweigh the factors in mitigation of the imposition of the sentence of death." Therefore, because the state carries the burden of proof, we hold that it has the right to open and close during final arguments to the jury.

In *State* v. *Bayless*, *supra*, we found that any decision to deviate from the statutorily mandated order of a trial rests within the sound discretion of the trial judge. In light of that holding, we find these words of the Court of Appeals for Lawrence County most appropriate: "A defendant in a criminal case does not have the right to control the trial court in the use of its discretion to choose the means under law by which an accused will be tried. Such defendant cannot successfully insist on some procedure he thinks would give him a better chance of minimizing the punishment he might receive * * *."[48] Accordingly, the trial court did not err in allowing the prosecution to open and close final argument in the penalty phase of this proceeding.

XIII

Appellant next contends he was denied a fair trial because the state violated an order *in limine* and made prejudicial comments relative to appellant's unsworn statement to the jury.

Before commencement of the penalty phase of the trial, appellant's counsel filed a motion *in limine* to prohibit the prosecution from comment-

[48] *State* v. *Wilson* (1971), 26 Ohio App. 2d 23, 28 [55 O.O.2d 47].

ing on appellant's exercise of the option to make an unsworn statement to the jury and that he not be subject to cross-examination. R.C. 2929.03(D)(1).[49]

The motion was granted. While the court considered the motion, the prosecutor said, "The State has no intention of commenting upon the fact he is making an oral statement and that, specifically, he was not under oath, and that specifically, we did not have the right to cross-examine * * *." Notwithstanding this pledge, however, the prosecutor, in closing argument, said, "Let me make a note of something else while I talk about that statement [of Jenkins]. You notice, ladies and gentlemen, that throughout this trial, this part, as well as the previous part, their witnesses came in and the witness took the oath —."

The defense promptly objected and the objection was sustained. A contemporaneous motion for mistrial was denied. The court warned the prosecutor to abandon the argument and then instructed the jury to disregard the prosecutor's comments.

The appellant asserts that his motion for a mistrial should have been granted. He relies heavily on the case of *Johnson* v. *United States* (1942), 318 U.S. 189, to support this contention. In that case, the defendant had taken the stand in his own defense, had answered the questions put to him by his counsel, and had answered some questions by the government's attorney. As to certain questions, however, the defendant asserted his Fifth Amendment right against self-incrimination. The trial judge permitted this selective-answer procedure. In closing argument, the prosecutor commented on the defendant's claim to the constitutional right. On review, the Supreme Court found that allowing the defendant to choose which questions he would answer once he had taken the stand was improper. But, the court stated: "Where the claim of privilege is asserted and unqualifiedly granted, the requirements of fair trial may preclude any comment [by the prosecution]." *Id.* at 196.

Appellant further argues that the prosecutor's statements constituted a violation of the rule established by *Griffin* v. *California* (1965), 380 U.S. 609, and adopted by this court in *State* v. *Lynn* (1966), 5 Ohio St. 2d 106, paragraph one of the syllabus: "Comment by the trial court or by the prosecutor upon the failure of an accused to testify in a criminal proceeding against him violates the self-incrimination clause of the Fifth Amendment made applicable to the states by the Fourteenth Amendment."

The cases cited by appellant in support of his claim are inapposite. All three decisions deal with situations where defendants exercised the constitutional right to remain silent. Appellant, however, did not choose to remain silent. He exercised his option to speak.

[49] R.C. 2929.03(D)(1), provides, *inter alia*, that the jury in the sentencing phase of the trial, shall hear any statements by the offender relative to the penalty issue. Further, that section states, "* * * If the offender chooses to make a statement, he is subject to cross-

In *Johnson* v. *United States*, *supra*, the United States Supreme Court condemned comments by the prosecutor relative to those questions the defendant refused to answer pursuant to the Fifth Amendment.[50] Likewise, in the decisions of *Griffin* v. *California*, *supra*, and *State* v. *Lynn*, *supra*, the defendants chose to remain silent, only to have their silence used against them. In those cases, as we have said, remarks by the prosecutor concerning a defendant's right to silence were found to contravene Fifth Amendment guarantees.

In the case *sub judice*, appellant claims that the prosecutor's agreement not to comment misled him into exercising his right to make the unsworn statement. Appellant says he relied on the prosecutor's assurances to his detriment and that he suffered prejudice because the prosecutor later made remarks that the prosecutor had said he would not make. We perceive no prejudice here. The prosecutor said nothing more than what the jury already knew to be true, namely, that all other defense witnesses testified under oath and that appellant did not. So, even though the prosecutor failed to keep his word and violated the order *in limine*, under the circumstances here, we find his utterances harmless and completely innocuous. *First*, his observations were not directed to any failure by appellant to testify. *Second*, the prosecutor's comments were limited to the fact that unlike other witnesses, the statement of appellant was not made under oath. *Third*, the trial judge warned the prosecutor not to proceed further in his statements. And *fourth*, any prejudicial effect was minimized by the court's instructions to the jury to disregard the prosecutor's comments.[51]

In view of the foregoing, appellant's contention is meritless.

XIV

Appellant claims that the trial court erroneously refused to instruct the jury on the lesser included offense of manslaughter. He asserts the court's failure to so instruct "* * * diminished the reliability of the guilt determination and enhanced the risk of an unwarranted conviction in derogation of appellant's rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution."

[50] The *Johnson* case is distinguishable for other reasons as well. In *Johnson*, the defendant was under oath, he was questioned by his own attorney, and answered some of the prosecution's questions on cross-examination. In the case at bar, appellant took the stand, but was not under oath. He was not examined by defense counsel, and was not subjected to cross-examination by the state.

[51] It is to be noted that we are not dealing here with substantial and extensive prosecutorial misconduct repudiated by this court in *State* v. *Smith* (1984), 14 Ohio St. 3d 13, *State* v. *Henry* (1983), 4 Ohio St. 3d 44, and *State* v. *Liberatore* (1982), 69 Ohio St. 2d 583 [23 O.O.3d 489]. In this case, the prosecutor's remarks were incidental and isolated. Given the wide latitude afforded counsel in summation, and the fact that the court took prompt corrective action, we cannot discern any h[illegible]

gravated murder. Consequently, the court could not have reasonably found against the state on this issue. It follows, then, that an instruction as to the lesser included offense of involuntary manslaughter was not warranted and not required. Consequently, appellant's contention that he was entitled to a charge on the lesser included offense of involuntary manslaughter lacks merit.

Appellant next contends that there was insufficient evidence as a matter of law to prove that he specifically intended to murder Officer Johnson and attempted to murder Officer Myhand.

Appellant erroneously assumes that the evidence relied upon to prove specific intent was mere circumstantial evidence. The words of the appellant himself, alluded to in our discussion of the previous issue, were enough to show that he possessed the specific intent to kill. Appellant's menacing threats, uttered inside the bank, constituted direct evidence of his state of mind and of his intentions. The credibility of this evidence is bolstered by the fact that he did what he threatened to do -- he turned and fired through the doors of the bank where he knew the officers were about to enter. As aptly stated by the Illinois Court of Appeals: "[W]here a remark is made spontaneously and concurrently with an affray, * * * or the like, it carries with it inherently a degree of credibility * * * because of its spontaneous nature." *Carroll* v. *Gulley* (1968), 39 Ill. App. 2d 470, 475, 188 N. E. 2d 267, 270.[14] Moreover, ballistics testimony indicated that a bullet found near the deceased officer's body was identified as of a kind that only the appellant's gun could have fired.

With regard to the charge of attempted murder of Officer Myhand, appellant contends, essentially, that the fact that Myhand was not shot is evidence of appellant's lack of intent to kill him. However, a claim that no harm resulted to a potential victim is no defense to a charge of attempted murder. R.C. 2923.02(A), Ohio's attempt statute, refers to "conduct which, if successful, would constitute or result in the offense."[15] For a conviction on this offense, there is no requirement that the victim sustain an injury from the attempted act. The offender's intent is the key.

In finding against the appellant on this point, we again reiterate that "[a] reviewing court will not reverse a jury verdict where there is substantial evidence upon which a *jury* could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *State* v. *Eley* (1978), 56 Ohio St. 2d 169 [10 O.O.3d 346], syllabus. We find

[14] This same principle also was well put by the Eighth Circuit Court of Appeals in *Parker X Ray Corp.* v. *Frerker* (C.A. 8, 1969), 405 F. 2d 916, 922: "Statements made at the time of an act * * * have been regarded, because of their spontaneity, as inherently credible * * *."

[15] R.C. 2923.02(A) provides:

"No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense."

the necessary "substantial evidence" is present. the appellant made no secret of his intention to "blow the * * * [policeman's] head off." He then followed through by firing his gun at the officers. Appellant's stated intent, coupled with the act, ended in the death of one officer and an attempt to take the life of another. We therefore can only conclude that appellant intended this result. Appellant's claims as to the insufficiency of the evidence are devoid of merit.

XV

Appellant next claims he was denied the effective assistance of counsel because the trial judge limited the time for presentation of closing arguments in both the guilt and sentencing portions of the trial.

In the guilt phase of the trial, thirty-six witnesses testified, the evidence was conflicting, and the ballistics and medical testimony was of a technical nature. Because the court allowed only one and one-half hours of the requested two and one-half hours for closing, appellant claims he suffered prejudice. Three witnesses testified in the penalty phase of the trial. Appellant does not say how much time was allotted or used, but complains that he was not afforded the full four hours he requested. Here again, appellant claims prejudice. In the face of these time limitations, appellant moved for a mistrial. The motion was overruled.

It is well-established that the time allowed for closing argument is within the sound discretion of the trial court. *Halsey* v. *State* (1932), 42 Ohio App. 291, 297, appeal dismissed (1932), 125 Ohio St. 628; *State* v. *Kay* (1967), 12 Ohio App. 2d 38, 49-52 [41 O.O.2d 91]; *United States* v. *Mills* (C.A. 6, 1966), 366 F. 2d 512, 515. The exercise of such discretion " * * * will not be interfered with by an appellate tribunal in the absence of a clear showing of its abuse to the prejudice of the substantial rights of the complaining party. * * * " *Browning* v. *Randall* (1960), 170 Ohio St. 444, 446 [11 O.O.2d 209]. In the *Browning* case, we further held that " * * * [t]he only limitation upon the discretion of the court to limit the length of arguments, however, is that the time given must be reasonable and of such length as not to impair the right of argument or to deny a full and complete defense. * * * " *Id.*

The latest pronouncement on this issue in Ohio appears in the case of *State* v. *Kay*, *supra*, at 49-50. There, the court of appeals acknowledged that " '[n]o precise rule can be laid down as to the time limit to which the trial court may properly restrict the argument of counsel, since what might be a reasonable limitation in one case would unquestionably be unreasonable in another. * * * ' " From *Kay*, *supra*, at 49-52, we note five factors which are to be considered in determining whether a particular time limitation on closing argument constitutes an abuse of discretion: (1) the circumstances of the case, (2) the gravity of the offense, (3) the number of witnesses examined, (4) the volume of the evidence, and (5) the time consumed by the trial.

In Ohio, "if lesser offenses are included within the offense charged, the defendant may be found not guilty of the degree charged but guilty of an inferior degree thereof, or of a lesser included offense." Crim. R. 31(C); R.C. 2945.74.

The primary difference between involuntary manslaughter and aggravated murder is the offender's intent. *See, e.g.* the first sentence of paragraph two of the syllabus in *State* v. *Johnson* (1983), 6 Ohio St. 3d 420, reversed on other grounds (1984), ___ U.S. ___, 81 L. Ed. 2d 425. A conviction for aggravated murder is warranted where the accused "purposely caused[-] the death of another while committing * * * aggravated robbery or robbery * * *." R.C. 2903.01(B). For involuntary manslaughter the killing need only occur "as a proximate result of * * * committing or attempting to commit a felony." R.C. 2903.04(A).

In *State* v. *Lowdermilk* (1965), 2 Ohio St. 2d 79 [31 O.O.2d 60], syllabus, we held: "Where the evidence in a criminal case would support a finding by the jury of guilt of a lesser offense included in the offense for which defendant was indicted and tried, the refusal of the trial court to charge upon that lesser included offense is error prejudicial to the rights of defendant." Later cases, however, have shown that the *Lowdermilk* rule is not absolute. For example, in *State* v. *Wilkins* (1980), 64 Ohio St. 2d 382 [18 O.O.3d 528], at 387, we commented that, "[t]he mere fact that an offense can be a lesser included offense of another offense does not mean that a court must instruct on both offenses where the greater offense is charged." The policy underlying this, the court noted, is that "jurors were not to be presented with compromise offenses which could not possibly be sustained by the adduced facts." *Id.*

In *State* v. *Nolton* (1969), 19 Ohio St. 2d 133, at 135 [48 O.O.2d 119], we stated:

" * * * [I]f the trier could *reasonably* find against the state and for the accused upon one *or more* of the elements of the crime charged and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense, then a charge on the lesser included offense is both warranted and required, not only for the benefit of the state but for the benefit of the accused." (Emphasis sic.)

Finally, in *State* v. *Solomon* (1981), 66 Ohio St. 2d 214 [20 O.O.3d 213], the following was announced, at paragraph two of the syllabus:

"Where the evidence adduced on behalf of the defendant constitutes a complete defense to the substantive elements of the crime charged, an instruction on a lesser included offense should be given to the trier of fact only if, based on the evidence adduced by the state, the trier of fact can find for the defendant and against the state on some element of the greater offense which is not required to prove the commission of the lesser offense and for the state on the elements required to prove the commission of the lesser offense."

Under this rule, the burden is on the defendant, once the state has presented its evidence on the substantive elements of the crime charged, to show a defense to certain elements of that offense and thereby obtain an instruction to a lesser included offense. Elaborating further in the *Solomon* case, this court stated, at 220:

" * * * An offense becomes a lesser included offense of another for purposes of R.C. 2945.74[16] only if the trier of fact is presented with some evidence supporting a finding against the state and for the accused on an element of the greater offense which need not be shown to prove the lesser offense. In such a case an instruction on the lesser included offense is warranted. Juries must not be presented with unreasonable compromises. As we stated, at page 387, in *Wilkins*, *supra*:

" * * * Such unreasonable compromises are detrimental to both the state and the defendant. These compromises allow juries to lessen punishment at their unlimited discretion, even when they find the defendant guilty of the greater offense beyond a reasonable doubt. Further, they can allow juries to convict a defendant of a crime of which he is not guilty beyond a reasonable doubt with a clearer conscience than if only the greater offense were charged.' "

The facts of this case indicate that the trial court could not reasonably have found against the state on the issue of specific intent to kill. Ivan D. Wright, one of the tellers in the bank, testified that appellant told him, "If * * * [you] tremble * * * too hard * * * [I will] blow * * * [your] Mother fucking head off." He further testified that Jenkins told his accomplice that the police had arrived and that he (appellant) would "blow the mother fucker's head off." Appellant then turned and fired through the door. Kenneth M. Goetz, another prosecution witness, testified that appellant said, "The police are at the door. We are going to have to shoot our way out of here." Appellant then shot through the door. State's witness William C. Anderson told the court that appellant said something to the effect that he would "get" the officer just before firing through the door. According to Henry Browning, a security guard in the bank, appellant saw the police and said, " * * * we will have to shoot our way out," and then appellant fired through the glass doors. Numerous other state's witnesses testified similarly.

Although appellant offers some testimony to the contrary, the testimony of the witnesses establishes conclusively that the appellant possessed the intent to kill necessary to sustain a conviction for ag

[16] In pertinent part, R.C. 2945.74 provides:

"The jury may find the defendant not guilty of the offense charged, but guilty of an attempt to commit it if such attempt is an offense at law. When the indictment or information charges an offense, including different degrees, or if other offenses are included within the offense charged, the jury may find the defendant not guilty of the degree charged but guilty of an inferior degree thereof or lesser included offense."

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The trial judge here undoubtedly determined that the salient and essential features of the evidence and the applicable law could be fully presented without any prejudice to the appellant's rights within the time allotted.[50] Because we have examined appellant's claims on this issue, and because we find them unpersuasive, we conclude the trial court was correct in this determination. Appellant's right of argument was not impaired, nor was he denied a full and complete defense.

The Supreme Court of Michigan, in *Spalding* v. *Spalding* (1959), 355 Mich. 382, 384-385, 94 N.W. 2d 810, 811-812, commented in terms appropriate to this issue:

"[A]n abuse of discretion involves far more than a difference in * * * opinion * * *. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. So tested, we perceive no error in the proceedings below [on this issue] nor in the determination made."

Consequently, appellant's contention is without merit.

XVI

Appellant next argues that the trial court abused its discretion in refusing to accept a change of plea to some counts in the indictment.

Appellant initially pled not guilty to all counts of the indictment. During the voir dire prior to trial, appellant requested to change his plea on fifteen counts of the indictment, specifically he sought to plead guilty to the eight counts of aggravated robbery and seven counts of kidnapping, and to plead no contest to the charge of possession of criminal tools. The state objected, arguing that appellant was attempting to create delay or provide a basis for potential collateral estoppel or double jeopardy arguments. The trial court refused to allow the change of plea.

R.C. 2943.03 provides in part: "* * * The court may, for good cause shown, allow a change of plea at any time before the commencement of the trial."

Crim. R. 11(C)(2) provides, in relevant part: "In felony cases the court may refuse to accept a plea of guilty or a plea of no contest * * *."

These provisions give the court discretion in determining whether to accept a change of plea.

Appellant concedes that he has no constitutional right to have his guil-

[50] Although the trial court originally granted appellant's request for four hours' time for argument in the penalty phase, we fail to perceive any abuse of discretion because he later reduced the time. The change was made after defense counsel told the court that he would [illegible]

ty plea accepted. See *North Carolina* v. *Alford* (1970), 400 U.S. 25 [56 O.O.2d 85]. He contends, however, that the court abused its discretion in this case by refusing to accept the change of plea because the court permitted the jury to hear the presentation of endless cumulative evidence in proof of the crimes to which he admitted guilt. Such an evidentiary presentation, appellant argues, clouded the actual issue before the jury of whether Jenkins possessed specific intent to kill Anthony Johnson. Moreover, this required the court to instruct the jury on all of the admitted felonies, which appellant contends made the instructions very complicated and difficult for the jury to follow.

We are unpersuaded by appellant's arguments inasmuch as we believe the denial of the change of plea was due, at least in part, by the actions of defense counsel.

The timing of the request to change plea was probably the result of defense strategy. Counsel was aware of the overwhelming evidence of guilt on these charges long before trial and should reasonably have anticipated what he now claims is the prejudicial effect of having them all heard at trial. This motion could have been made earlier giving the state more time to consider the possible adverse effects of the change of plea. As it was not made earlier, however, the trial court was also required to consider the disadvantage of the prosecutor. The facts are not so one-sided as to constitute an abuse of discretion.

XVII

Appellant next contends that written police reports prepared by state witnesses are discoverable at trial under Crim. R. 16. He submits that his cross-examination of the witnesses was prejudicially impaired when the court failed to conduct an in camera inspection of the documents to determine if the reports were subject to disclosure under Ohio's Criminal Rules.

Officers Howard and Henderson testified for the state on direct examination as to what they personally saw and heard upon arrival at the crime scene outside the bank. On cross-examination defense counsel ascertained that Howard had prepared a police report detailing his involvement with the arrest of the appellant and his accomplice.[51] At that point, the

[51] Defense counsel asked Officer Howard about any police reports as follows:

"Q. Patrolman Howard, in preparation for your testimony in court this morning, did you have occasion to read any reports that you prepared?

"A. No, I did not.

"Q. Did you prepare a police report on October 21st or any other day thereafter, detailing your involvement with this situation?

"A. Yes, I did.

"Q. And would this have been a Form 1 report?

"A. Correct.

"Q. Did you also have occasion to prepare a BC 1 report?

"A. No, I did not.

"Q. Did you have occasion to sign the Form 1 report?

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court asked the prosecutor to see "the statement." The prosecutor replied, "I do not have any written statement from this police officer. I merely have a police report." Defense counsel felt that the police report was a statement. However, he neither requested that anyone inspect it, nor that it be preserved for appellate review. Following similar direct and cross-examination of Henderson,[52] defense counsel asked the second officer whether his report included appellant's statement to him: "I shot him [Johnson] because he was going to shoot me." When the witness replied that it did, defense counsel made his sole request regarding Henderson's report:

"Judge, at this time I would ask the court to review the report of Officer Henderson, not because he used it to refresh his recollection, but to determine whether or not that in fact is in his report. If it is not in his report, it could be exculpatory in nature and we should be able to use this report to cross-examine on *this issue*." (Emphasis added.)

The prosecutor then supplied the report to the judge, who read it and stated, "That is the same thing he testified to." The court then read that portion of the report into the record:

"This is the report signed by Gregory Henderson, 'Gregory Henderson: Why did you shoot him?' and Jenkins stated to him in reply, 'He did not want to get shot by the police.' "

The judge confirmed the date of the quoted report and asked defense counsel, "Anything further?" Defense counsel replied, "No, judge." Appellant made no further request or motion that anyone inspect the report and no request that the court preserve it for appellate review.

The appellant now contends that the police reports are discoverable statements under Crim. R. 16(B)(1)(g).[53] He argues that it was prejudicial error for the court not to conduct in camera inspections as provided for in the rule. Appellant further contends that his failure to request an inspec-

[52] When the state completed its direct examination of Officer Henderson, defense counsel asked him about his police report. The officer replied that he made, read, and signed the report on the day of the alleged offenses. He had "glanced at it a couple of times" since then. He had not reviewed it with the prosecutors or other police officers.

[53] Crim. R. 16(B)(1)(g) provides:

"Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

"If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.

"If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

"Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an ap-

tion was because of the court's tacit finding that the documents were nondiscoverable at trial and that the absence of the reports from the record is excusable as it was the court's duty and not appellant's to see that the documents were available on appeal.

The state responds that no error occurred, as the two documents which defense counsel sought to examine were police reports, which are excluded from discovery requirements by Crim. R. 16(B)(2).[54] The state also contends that this issue was waived by the appellant because motions for in camera inspections were not made, a proper foundation was not laid concerning the existence of witness statements, and the documents were not preserved in the record for appellate review as is mandated by the Criminal Rules.

Clearly, a signed written statement of a state witness would serve the purpose of Crim. R. 16(B)(1)(g) and fall within the plain meaning of the word "statement," just as would a recording of the witness' words or a transcription thereof. We see no reason why the mere fact that the document was a report of a police officer would automatically bar its disclosure. When it is doubtful whether any discoverable statement exists, the court, on motion of the defendant, shall conduct a hearing on the issue of disclosure held *in camera* with both attorneys present and participating. *State* v. *Daniels* (1982), 1 Ohio St. 3d 69. See, also, *Palermo* v. *United States* (1959), 360 U.S. 343; *Fortenberry* v. *State* (1975), 55 Ala. App. 1, 312 So. 2d 573; *State* v. *Johnson* (1978), 62 Ohio App. 2d 31 [16 O.O.3d 74].

This is not to say that all portions of a police report are discoverable under Crim. R. 16(B)(1)(g). Reading this section *in pari materia*[55] with Crim. R. 16(B)(2), it becomes apparent that those portions of a testifying police officer's signed report concerning his observations and recollection of the events are "statements" within the meaning of Crim. R. 16(B)(1)(g). Those portions which recite matters beyond the witness' personal observations, such as notes regarding another witness' statement or the officer's investigative decisions, interpretations and interpolations, are privileged and excluded from discovery under Crim. R. 16(B)(2). Cf. *State* v. *Houston* (Iowa 1973), 209 N.W. 2d 42, 46. Hence, once it is determined that a report in which a producible out-of-court statement of the witness

[54] Crim. R. 16(B)(2) provides:

"Except as provided in subsections (B)(1)(a), (b), (d), (f), and (g), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents."

[55] There is a duty to construe all parts of a statute or rule *in pari materia* in order to give full effect to all provisions if it is reasonably possible to do so. Cf. *State, ex rel. O'Neil,* v. *Griffith* (1940), 136 Ohio St. 526 [17 O.O. 168]; *Warner* v. *Ohio Edison Co.* (1949), 152 Ohio [illegible]

The Fifth Amendment to the United States Constitution, as does Section 10, Article I of the Ohio Constitution, declares that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself * * *." This amendment "was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed." *Feldman* v. *United States* (1944), 322 U.S. 487, 489.

The provision is accorded liberal construction in favor of the right it was intended to secure, *Counselman* v. *Hitchcock* (1892), 142 U.S. 547, and affords protection not only to the accused but also to witnesses who may always claim as privileged that which tends to incriminate themselves. *Malloy* v. *Hogan* (1964), 378 U.S. 1; *In re Frye* (1951), 155 Ohio St. 345, 349 [44 O.O. 329].

Recently, in *United States* v. *Apfelbaum* (1980), 445 U.S. 115, 128, the Supreme Court stated that the question must pose "'* * * substantial and "real" and not merely trifling or imaginary, hazards of incrimination.'" The *Apfelbaum* decision, relied on heavily by appellant, appears to be of little additional value in the instant analysis as it concerned the issue of whether the testimony of a government witness, who had been granted statutory immunity, could be used in a subsequent trial for false swearing. Jordan was a defense witness, did not have immunity and did not testify. However, the *Apfelbaum* court did reaffirm its earlier pronouncements in *Rogers* v. *United States* (1951), 340 U.S. 367, and *Brown* v. *Walker* (1896), 161 U.S. 591, which provide, *inter alia*, that the right to decline answers to specific questions applies only when the danger of incrimination is real and appreciable, rather than imaginary and insubstantial. The witness may validly invoke this privilege whenever the answer could reasonably serve as a link in the chain of evidence against him. *Hoffman* v. *United States* (1951), 341 U.S. 479, 486-487.

If a witness refuses to answer a question, basing his refusal upon the reason that his answer would incriminate him, his belief is not always conclusive with respect to the incriminating character of the evidence sought to be elicited. Rather, a question is presented for the determination of the court to decide whether any direct answer may reasonably have a tendency to incriminate the witness or to furnish proof of an element or link in the chain of evidence necessary to convict him of a crime. If the answers clearly would not incriminate him, he may be required to answer. *Hoffman, supra*; *McGarray* v. *Sutter* (1909), 80 Ohio St. 400; *Hebebrand* v. *State* (1935), 129 Ohio St. 574, 580 [2 O.O. 562]; *Ex parte Irvine* (Cir. Ct. S.D. Ohio 1896), 74 F. 954; *United States* v. *DiCarlo* (N.D. Ohio 1952), 102 F. Supp. 597.

A witness may waive his personal privilege if he desires to do so. *Mimms* v. *State* (1856), 16 Ohio St. 221, 230-231. See, also, *Rogers, supra*. The privilege is not violated if he testifies without objection and it is inferred that he did so voluntarily. *Lindsey* v. *State* (1903), 69 Ohio St. 215, 223; *Burke* v. *State* (1922), 104 Ohio St. 220.

The weight of authority supports the rule, followed by the courts below in the instant case, that a witness who has begun the account of a transaction will be compelled to complete the narrative. Courts will not allow a witness to state a fact and afterwards refuse to give the details or to answer legitimate questions pertaining to the initial statement. *Rogers, supra*, at 373-375; *Mimms, supra*, at 230-231; *Este* v. *Wilshire* (1887), 44 Ohio St. 636. A witness who testifies to the "transaction" cannot refuse to answer further questions relative to the matter on the ground that the answers will incriminate him. *Id.*[8]

As applied to the case *sub judice*, it is clear that the initial questions asked Jordan by defense counsel concerning his presence at the bank were incriminating in and of themselves. Additionally, they would tend to link Jordan to the "transaction" at the bank, and if answered by Jordan would have left him unprotected regarding further legitimate questions pertaining to his initial statements. The defense questions would reveal that Jordan knew the appellant, was present when the appellant was lying on the ground, was in a position to overhear any confession made by appellant, was at the arrest scene, and would have led to more explicit and detailed inquiry concerning his statements, thus comprising a real and substantial danger of further self-incrimination. The trial judge stated that "[o]nce the constitutional privilege is waived, the State has an opportunity to invade the entire — to inquire on the entire issue, the entire *transaction*." (Emphasis added). It is apparent that the judge properly recognized the real and appreciable self-incrimination implications and did not err in refusing to compel Jordan's testimony concerning the privileged matter. We find no error in the trial court's refusal to compel witness Jordan's testimony over his invocation of his Fifth Amendment protection against self-incrimination. Likewise, we hold that Section 10, Article I of the Ohio Constitution provides protection for witnesses, such as Jordan, who may always claim as privileged that which tends to incriminate themselves. Accordingly, appellant's argument in this regard must be overruled.

XIX

Appellant next contends that his inculpatory statement at the hospital emergency room was obtained by the police in disregard of his constitu-

[8] The Supreme Court in *Rogers, supra*, at 374, fn. 16, quotes an earlier Michigan decision with approval as follows:

"'The case of the *ordinary witness* can hardly present any doubt. He may waive his privilege; this is conceded. He waives it by exercising his option of answering; this is conceded. Thus the only inquiry can be whether by *answering as to fact X, he waived it for fact Y*. If the two are related facts, parts of a whole fact forming a single relevant topic, then his waiver as to a part is a waiver as to the remaining parts; because the privilege exists for the sake of the *incriminating fact as a whole*.' (Emphasis in original.)"

being examined exists, the trial court, on motion of the defendant, must afford attorneys for all parties the opportunity to inspect the "statement" portions personally. *State* v. *Daniels*, *supra*, at 70-71.

However, in the case *sub judice* the court *sua sponte* asked the prosecutor to see Howard's report and not on defense counsel's motion. Subsequently, defense counsel merely asked the judge to review a portion of Henderson's report to ascertain if appellant's inculpatory statement therein was consistent with the officer's testimony. The judge complied with this request, indicated the statement was consistent with the testimony and read the appropriate portion of the report into the record. At that point the judge queried, "Anything further?" and defense counsel replied, "No judge."

At the time of the officers' examination, appellant knew that an *in camera* inspection had not been conducted and should have objected at that time, or otherwise moved the court to conduct such an inspection if he believed it was necessary to do so. In a situation such as this a defendant cannot be heard to complain on appeal about a matter which the trial judge could have remedied if the defense had complained then. *State* v. *Williams* (1977), 51 Ohio St. 2d 112 [5 O.O.3d 98], paragraph one of the syllabus; *State* v. *Graves* (1978), 54 Ohio St. 2d 114, 116 [8 O.O.3d 125]. Cf. *Engle* v. *Isaac* (1982), 456 U.S. 107; *Pittsburgh Plate Glass Co.* v. *United States* (1959), 360 U.S. 395, at 401.[10]

Lastly, this assignment of error must be overruled for a failure to comply with the last paragraph of Crim. R. 16(B)(1)(g). A copy of the statement was not "preserved" or included in the record as is mandated by the rule. The appellant has failed to demonstrate that he either requested this be done or objected in any manner to its omission. Neither report is before this court, and other than appellant's speculative conjecture, there is an absence of any showing of actual prejudice. *See Cleveland* v. *Austin* (1978), 55 Ohio App. 2d 215, 223-225 [9 O.O.3d 368]; *Fortenberry*, *supra*, at 3-4. Accordingly, we hold that the trial court did not err in ruling that these statements were not subject to disclosure under Crim. R. 16.

XVIII

Appellant argues that he was denied a fair trial in that the trial court refused to compel testimony from a defense witness who had invoked his Fifth Amendment privilege against self-incrimination.

The defense witness, Lester Jordan, was indicted with the appellant for the identical charges. The court ordered separate trials, and the appellant was tried first. During the state's case, Officer Henderson testified

[10] In *United States* v. *Nobles* (1975), 422 U.S. 225, the Supreme Court stated that an order of the trial court requiring the defense to produce relevant portions of a defense investigator's report for the prosecution's use cannot be challenged on appeal by the appellant on grounds or issues that defense counsel failed to develop or urge at trial. *Id.* at 238, 239.

he heard Jenkins tell Jordan that he shot Officer Johnson because he didn't want the police officer to kill him. Appellant subpoenaed Jordan as a defense witness to deny the conversation and to testify that appellant was then unconscious and unable to speak due to his injuries.

The court preliminarily advised defense counsel and Jordan's counsel that such testimony would constitute a waiver of Jordan's privilege against self-incrimination concerning the transaction of the testimony. The court then permitted the defense to conduct a *voir dire* examination of Jordan outside the jury's presence to determine whether he would invoke his privilege. After elicitation of his name and age, Jordan refused to answer any of defense counsel's inquiries concerning the events at the bank.[9]

Appellant contends that he was denied his right to compulsory process and to a fair trial in that the responses he sought to obtain from Jordan fall outside the witness' Fifth Amendment protections and would not involve a waiver to further inquiry on direct or cross-examination concerning the subject of his testimony.

The state submits that no error occurred, as the danger to the witness was real, appreciable and quite clear. The state contends that Jordan's answers to defense counsel's questions likely would have incriminated Jordan and left him vulnerable on cross-examination concerning the circumstances and details of the activity at the scene of the crime.

[9] Defense counsel's questioning of Jordan on direct examination was as follows:

"Q. Directing your attention to October 21st of last year, to the front of the National City Bank at around 9:40 in the morning, did you have occasion to be out there in the presence of Leonard Jenkins who was laying [*sic*] on the ground and a black police officer?

"A. I refuse to answer on the grounds that it may intend [*sic*] to incriminate me.

"Q. Did you ever hear Leonard Jenkins confess this crime to anybody?

"A. I still refuse to answer on the ground it may intend [*sic*] to incriminate me.

"MR. TITTLE: Judge, the last question, 'Did you ever hear Mr. Jenkins confess this crime to anybody,' that could in no way incriminate this witness.

"THE COURT: You have your exception.

"MR. TITTLE: I would ask the Court to order him to answer. It is not incriminating.

"THE COURT: You have your exception. The Court will not.

"Next question, please.

"MR. TITTLE: One second.

"BY MR. TITTLE:

"Q. From now on whatever question I ask you, are you going to try to take the Fifth Amendment?

"THE COURT: If you wish you may confer with your attorneys. Approach the witness, Mr. Keane or Mr. Carson [Jordan's counsel].

"(Thereupon, a discussion was had between the witness and his counsel, Mr. Thomas Keane, off the record.)

"A. I invoke the Fifth Amendment.

"Q. You take the Fifth Amendment?

"A. Yes.

"Q. You won't even answer that question?

"A. Right."

tional rights against self-incrimination, and to counsel, and was involuntary due to his low intelligence combined with the surrounding circumstances.

The hospital staff testified that upon admission to the emergency room at 9:51 a.m. the appellant was "very shocking, cold, and clammy." Appellant suffered from a gunshot wound to his left chest and spinal cord. He was moaning in pain upon admission. Pain-killing drugs were not administered, however, a thorasic surgeon inserted a chest tube to relieve pressure from fluid build-up. Appellant's blood pressure was very low but began to rise after fluid was replaced intravenously. The attending physician, Dr. Mehir K. Datta, testified that at the time of admission to the emergency room, appellant's low blood pressure was due to blood loss, would result in decreased mental awareness, and that it was "quite possible that he could not understand questions * * *." An attending nurse stated that his blood pressure was much improved by 10:15 a.m. and was fluctuating between 60/40 at 10:30 a.m. and 100/60 at 11:00 a.m., and was more or less stable at 10:40 a.m.

When queried by the nurse, Judith Chase, at approximately 10:15 a.m., appellant gave her a fictitious name and was able to speak and to respond when asked to turn his body for an x-ray. He was also able to answer when asked to move his legs.

Detectives Michael J. Cummings, Leo Allen and Timothy Patton arrived at the emergency room at approximately 10:30 a.m. Cummings and Allen testified that they heard Patton advise appellant of his constitutional rights and also heard appellant's response that he understood his rights. The officers testified that he did not request a lawyer but did indicate he was willing to make a statement.

The officers testified that appellant appeared in some discomfort. Nevertheless, at the time of questioning, appellant, according to one of the officers, no longer appeared to be shaking, trembling or sweating. The officers went on to state that he was able to converse in a normal or low tone of voice. During this initial interrogation at the emergency room, which lasted anywhere from twenty to forty-five minutes, appellant made inculpatory statements that he had shot at the police because he did not want to get caught.

During this questioning, hospital staff were either attending or in view of the appellant at all times. Nurse Chase testified that she observed the police questioning appellant but that they were whispering and she did not hear the conversation's content.

Appellant's eventual demand to end the interrogation was honored by the police who terminated the questioning in the emergency room.

Appellant filed a pretrial motion to suppress the inculpatory emergency room statement, as it had not been obtained in conformity with *Miranda* v. *Arizona* (1966), 384 U.S. 436 [36 O.O.2d 237], and *State* v. *Kassow* (1971), 28 Ohio St. 2d 141 [57 O.O.2d 390], vacated in part on

other grounds (1972), 408 U.S. 939, nor in compliance with the due process voluntariness test under *Greenwald* v. *Wisconsin* (1968), 390 U.S. 519, 521, and *Lego* v. *Twomey* (1972), 404 U.S. 477. At the hearing on appellant's motion, appellant indicated that he had no recollection of the events in the emergency room.

As we stated in *State* v. *Buchholz* (1984), 11 Ohio St. 3d 24, 27: "The United States Supreme Court's decision in *Miranda* was designed to safeguard an individual's Fifth Amendment right against compulsory self-incrimination." An accused can waive his constitutional rights to silence and counsel if his election is made voluntarily, knowingly and intelligently. *Miranda, supra.*

"The merit of *Miranda*, as explained by Justice Blackmun in *Fare* v. *Michael C.* (1979), 442 U.S. 707, 718, is that the protections are neither one-sided nor designed strictly to benefit criminal defendants.

" '* * * *Miranda's* holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis.'" *Buchholz, supra*, at 27.

This court held in *State* v. *Scott* (1980), 61 Ohio St. 2d 155 [15 O.O.3d 182], at paragraph one of the syllabus:

"An express written or oral statement of waiver of the right to remain silent or the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in *Miranda* v. *Arizona*, 384 U.S. 436 [36 O.O.2d 237]. (*North Carolina* v. *Butler*, 60 L. Ed. 2d 286, 292, followed.)"

In addition to the requirements of *Miranda*, due process provisions of the federal Constitution dictate that the state must meet by a preponderance of the evidence its burden of proving that any inculpatory statement was made voluntarily. *Lego, supra.* The court must determine whether the totality of the circumstances demonstrates that the statements are of the accused's free and rational choice. *Greenwald, supra.*

In a case heavily relied on by appellant in his brief, and not altogether unlike the case at bar, the United States Supreme Court provided considerable guidance for this due process query of voluntariness in *Mincey* v. *Arizona* (1978), 437 U.S. 385. *Mincey* provides that use at trial of an involuntary statement is a denial of due process and reversible error. To be

admissible, a confession must be the product of rational intellect and a free will.

In *Mincey*, as well as in the case *sub judice*, both appellants suffered gunshot wounds in situations where a police officer died. Both appellants made inculpatory statements while in custody at a hospital after being taken to its emergency room. The Supreme Court in *Mincey* determined that the appellant was weakened by pain and shock, isolated from family and counsel, and was barely conscious at the time of the confession. In holding the confession involuntary, the Supreme Court closely considered all relevant facts surrounding the confession and cautioned that the determination of whether a statement is voluntary requires more than a mere color-matching of cases. It requires careful evaluation of all the circumstances of the interrogation. *Id.* at 401.

Comparison of the hospital setting in *Mincey* with a close examination of the setting in the case at bar reveals significant factual distinctions which must be evaluated to determine whether appellant knowingly waived his rights and made a voluntary statement. In *Mincey*, the accused was interrogated for four hours, during which time he continuously lapsed in and out of unconsciousness. Mincey repeatedly sought to terminate the questioning by invoking his right to counsel which was not honored by the police. Mincey was unable to talk and had to write his responses to the questions. Mincey complained of being confused or unable to think clearly and accurately and asked that the officer desist questioning until the next day. The court found that Mincey's statements were not the product of a rational intellect and a free will and held that the conviction could not stand.

In the case at bar, much of the untrustworthy indicia of *Mincey* are not present. Although both cases involve a wounded murder suspect's hospital statements, the circumstances of the interrogations are factually distinguishable. In the case *sub judice* the record reveals that the appellant's blood pressure was improving and was more or less stable at the time of questioning. The entire episode lasted no more than forty-five minutes during which the appellant was always conscious. Unlike Mincey, who could not then speak, testimony reveals that appellant could converse and did so in a normal voice. The state's witnesses indicated that appellant understood his rights and expressed a willingness to talk with the police. When appellant indicated he no longer wished to speak with the officers, the interrogation was promptly terminated. The facts do not reveal an indication of police coercion or abuse. Detective Allen testified that he received permission to interview appellant from a doctor at the hospital prior to the questioning. Although this conversation was apparently not otherwise confirmed at the suppression hearing, the surrounding facts demonstrate that the emergency room staff were aware of the police presence and questioning. Other than asking the officers to move at times

personnel warned that the interview was contra-indicated due to appellant's condition.

Appellant also contends that he lacked sufficient intelligence to understand his rights or the effect of a waiver. Appellant has a low I.Q. and his mother testified that he was in a "slow learner class" while attending junior high school. Citing the case of *Tague* v. *Louisiana* (1980), 444 U.S. 469, in support, appellant asserts that low intelligence precludes a knowing waiver absent proof contra by the state. Intelligence is undoubtedly one factor for a court to weigh when considering the voluntariness of an inculpatory statement. In *Tague*, however, the Supreme Court was faced with a situation where the police officer did not form an opinion as to whether the accused understood his rights nor, even remembered for certain if he had even informed the accused of those rights. Faced with such a set of facts, the Supreme Court understandably held there was a lack of any evidence that the accused had been advised of or knowingly waived his rights. In the instant case, the police officers testified that they had indeed informed appellant of his rights and that he affirmatively responded he understood and waived those rights. Appellant's answers to the officer's questions appear responsive. Appellant correctly points out that the officers are not trained medical experts. However, based on their observations and conversations with the appellant they believed he did comprehend the effect of his waiver and the rights involved. While the explanation of rights and their waiver must be weighed with the individual's medical condition and mental capacity, the totality of the evidence supports the trial court's judgment to admit the statement in this case. *State* v. *Royster* (1976), 48 Ohio St. 2d 381, 387-389 [2 O.O.3d 489], vacated in part on other grounds (1978), 438 U.S. 911. See, also, *Boulden* v. *Holman* (C.A.5, 1967), 385 F. 2d 102, vacated in part on other grounds (1969), 394 U.S. 478; *United States* v. *White* (C.A.5, 1971), 451 F. 2d 696, certiorari denied (1972), 405 U.S. 998.

Resolution of this issue undeniably involves a close scrutiny of police conduct, appellant's condition (mental and physical), and the other attendant conditions. Our evaluation of the circumstances, however, reveals that the lower court's decision is not erroneous and that the government met its burden of proving the voluntariness of the confession. *Lego, supra.* Further, the evidence fully supports a finding that appellant knowingly and explicitly waived his constitutional rights under the Fifth and Sixth Amendments. When he did invoke his privilege, his right to terminate the interrogation was scrupulously honored. *Michigan* v. *Mosley* (1975), 423 U.S. 96. See, also, *Edwards* v. *Arizona* (1981), 451 U.S. 477.

XX

Appellant claims that he was prejudiced by the trial judge's contact and discussions with the jury [illegible]

reporter, during the interval of time following the verdict in the guilt phase of the bifurcated trial and prior to the penalty phase.[62]

During their actual deliberations in a capital case, jurors must be sequestered. R.C. 2945.33. Ohio's statutory framework for imposition of capital punishment neither mandates nor precludes sequestration of the jury following its guilty verdict, but prior to the penalty phase. However, in an effort to minimize the risk of jury contamination, the court herein directed that the jury remain under loose court supervision between the two trial segments. During this interval the jury was not receiving evidence or deliberating; however, the court believed certain communications could be prejudicial. The court transported the jurors to a resort motel in an adjoining county where bailiffs could monitor their activities. Their spouses and children could visit, and they could participate in various recreational activities. The trial judge also advised counsel that he would dine with the jurors on occasion to check the arrangements, help insure they were adhering to the court's instruction and assist jurors in resolving personal problems.[63] These arrangements were made with the knowledge and apparent consent of defense counsel. Prior to departing, the court admonished the jurors in the presence of defendant and all counsel that they should not discuss the case with anyone. He instructed them not to watch television, listen to the radio, or read newspapers. He further advised them: "If you have a serious personal problem, then you will bring that to my attention through the court people who will be with you to help you out and I will make my appearance at the hotel very frequently." His last words at this juncture were: "We are going to retire now. We will let you go to supper and I will join you with my wife. The Court stands adjourned." The defense expressed no objection to these comments which the judge made in open court.

After the jury had completed its responsibilities for the penalty phase, defense counsel filed a timely motion for a new trial. One ground for that motion asserted that the judge had "discussions with the jury in the absence of the court reporter." The court scheduled and conducted a post-trial hearing on appellant's new trial motion. The appellant did not call any witnesses at the hearing regarding this claim and the sole evidence

[62] When the jury returned its verdicts of guilt, the court scheduled the penalty phase to begin ten days later. This interim period was to afford appellant an opportunity to request and obtain a presentence investigation and a psychiatric examination pursuant to R.C. 2929.03(D)(1). Additionally, the court conducted hearings regarding proposed evidence and procedures for the penalty phase.

[63] The trial judge told counsel on the record:

"I myself, personally, intend to go out there every other day and give them instructions about their conduct, vis-a-vis, I will make it casual, meet them for lunch, you know, and get them all together and give them that instruction as to their conduct so that no one can say that we weren't strict enough with them."

consisted of defense counsel's affidavit in which he presented his personal knowledge of the trial judge's contact with the jury.[64]

The trial judge admitted at the hearing that he discussed problems concerning continued jury service with the jurors, and in one instance where a juror expressed concern as to continuing, the court apparently told him to have his children visit him at the motel. The trial judge went on to state that there was no communication between the jury and himself regarding the jury's deliberation, sentencing, the verdict, or the case in general.[65]

[64] The sole evidence submitted to support that branch of the new trial motion was an affidavit by defense counsel which stated in part:

"4. I was present, along with * * * [the prosecutor and other defense counsel] in the chambers of David T. Matia when Judge Matia admitted that he, not a bailiff or a clrk [sic] took the jurors to dinner at McCarvey's [sic] Restaurant in Vermillion, Ohio on or about March 31, 1982;

"5. I was also present on an [sic] date earlier in Judge Matia's chambers when he informed all present that he was going to the Aquamarine, where the jurors were sequestered, during the week between the end of the first trial and the commencement of the second trial;

"6. I did not object to this because I felt that the judge was not being entirely serious, and I felt that if the Court were going to reinstruct the jurors on anything that the court reporter would have been present;

"7. I had previously filed a motion to record all proceedings, which was granted, and I felt directed that all communications to jurors in this case would have been recorded."

[65] At the post sentencing hearing the trial judge stated:

"Now, for your information, the so-called McGarvey supper was not during deliberations. It was in the so-called semi sequestration where the jurors were kept away from the general public, but allowed to see their families, have their families physically there. They were allowed to talk with people in the hotel who they casually came upon but not about the case.

"Secondly, at that time [of] the so-called McGarvey's dinner, this Court said nothing whatsoever to them about this trial, what their verdicts should be or anything else of the sort except the standard warning and admonition, don't talk about the case, as was said by this Court 150 times vigorously. There was no communication, no written material, no impression of the Court of anything of the sort.

"There were communications from the jurors to the Court about personal problems. One juror had a problem because his two sons, apparently missed their dad, let's put it that way. One or two problems about when they can go back to work and the answer was the same answer as always given, I don't know."

Later in the hearing, the trial judge added:

"I have had sequestered jurors before, I remember vaguely, but I am not certain of the exact number, half a dozen or less cases, and every instance I had supper with my jurors. And in every instance that we had supper at the Bond Court of Hollenden House, there has not been a court reporter. The exact same format was followed in this matter.

"If you recall, gentlemen, our conversations in chambers about what the hell we are going to do with this jury over this long period of time and there was no objection from the State or the defense about the Court seeing those jurors and seeing how the set-up was going.

"* * * [In] [n]one of my prior sequestrations was there a court reporter, and in this case, as in those cases was there any communication of the Court about the case or verdict or anything else."

Remmer v. *United States* (1954), 347 U.S. 227, affords a presumption of prejudice as to private communication between the court and a juror about the matter pending before the jury. The Supreme Court explained at 229:

"In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial *about the matter pending before the jury is*, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during trial, *with full knowledge of the parties*. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." (Emphasis added.)

Here, however, there is no claim of any discussion related to the case itself, as in *Remmer*, and the court's statements at the new trial hearing negate any prejudice. Additionally, all parties had full knowledge of the contacts in advance as the judge announced his intention, without objection, prior to adjournment. More recently, the Supreme Court reexamined this subject in *Rushen* v. *Spain* (1983), ___ U.S. ___, 78 L. Ed. 2d 267. The *per curiam* opinion stated at 272-273: "We emphatically disagree * * * [with the appellate court's ruling that] an unrecorded *ex parte* communication between trial judge and juror can never be harmless error * * *." *Rushen* supports both the necessity for a showing of prejudice and the position that a record is not required for all *ex parte* communications between the court and members of the jury.[66]

To prevail on a claim of prejudice due to an *ex parte* communication between judge and jury, the complaining party must first produce some

[66] In *Rushen*, a juror went to the judge's chambers on two occasions during the trial to express concern about information developed after jury empanelment. Trial evidence disclosed that the state's informant had been convicted of killing someone this juror knew. Although no reporter or counsel was present in the court's chamber, the judge reportedly asked whether the new evidence would affect her disposition of the case. She assured him that it would not, and he in turn told her not to be concerned.

The opinion reasons:

"In this spirit, we have previously noted that the Constitution 'does not require a new trial every time a juror has been placed in a potentially compromising situation * * * [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' *Smith* v. *Phillips*, 455 U.S. 209, 217 * * * (1982). There is scarcely a lengthy trial in which one or more jurors does not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial. The lower federal courts' conclusion that an unrecorded ex parte communication between trial judge and juror can never be harmless error ignores these day-to-day realities of courtroom life and undermines society's interest in the administration of criminal justice.

"This is not to say that ex parte communications between judge and juror are never of serious concern or that a federal court on habeas may never overturn a conviction for pre-

evidence that a private contact, without full knowledge of the parties, occurred between the judge and jurors which involved substantive matters.

Obviously, the stage of the proceedings is also critical, as communications prior to verdict are more suspect. Yet, even then, some communications are harmless. See *State* v. *Abrams* (1974), 39 Ohio St. 2d 53 [68 O.O.2d 121] (trial judge offers to reread part of his original instructions to answer a jury question in defendant's absence, but jurors elect not to hear it).

As the court said in *Rushen*, "[p]ost-trial hearings are adequately tailored" to the task of determining the nature of any communications and resulting prejudice. *Id.* at 274. We further note that any party can compel court personnel or jurors to testify concerning "any improprieties of any officer of the Court" or "whether extraneous prejudicial information was improperly brought to the jury's attention." Evid. R. 606(B).

In this case, defense counsel sought to rest on the judge's admission that he dined with the jurors. This admission failed to supply a threshold showing of a substantive communication, bias, or prejudice in light of the judge's further explanations on the record at the hearing. Additionally, the trial record and defense counsel's own affidavit disclose that the court advised all parties of his intended actions. By making no complaint, defense counsel waived any objection, if he did not affirmatively acquiesce. Counsel cannot complain on appeal about supposed errors which he chose not to assert when they could have been remedied at trial. *State* v. *Williams*, *supra*. We therefore hold that the *ex parte* communication complained of herein was innocuous. The judge and jurors did not discuss any fact in controversy or any law applicable to the case. Appellant was not prejudiced by this innocent interaction between the judge and jurors and no constitutional rights have been deprived.

XXI

In conclusion, based on the foregoing reasons, we uphold appellant's conviction and death sentence. As a testament to the gravity of sustaining a decision to impose the ultimate penalty, we have thoroughly examined and discussed each argument raised by appellant and, in fact, have agreed with appellant's arguments in certain respects. Nonetheless, we are completely satisfied that today's decision accomplishes the goal of all criminal cases — the fair and impartial administration of justice, *i.e.*, justice from both the accused's and society's perspectives.

Finally, no person is capable of completely putting aside the full range of emotions encountered when considering a capital case. We are com-

aspect of the trial, the trial judge generally should disclose the communication to counsel for all parties. The prejudicial effect of a failure to do so, however, can normally be determined by a post-trial hearing. The adequacy of any remedy is determined solely by its ability to mitigate constitutional error, if any, that has occurred. [Citations omitted]. Post trial hearings were adequately tailored to * * *."

THE STATE OF OHIO, APPELLEE, v. JOHNSON, APPELLANT.

[Cite as State v. Johnson (1986), 24 Ohio St. 3d 87.]

Criminal law—Aggravated murder—Death penalty vacated, when—Aggravating circumstances which may be considered limited to those specifically enumerated in R.C. 2929.04(A)—Ineffective assistance of counsel—Lack of reasonable investigation and preparation for sentencing phase.

6 Jur 3d Criminal Law §§ 302, 1841, 1843

R.C. 2941.14(B) limits the aggravating circumstances which may be considered in imposing the death penalty to those specifically enumerated in R.C. 2929.04(A).

(No. 85-93—Decided June 18, 1986.)

APPEAL from the Court of Appeals for Cuyahoga County.

On April 26, 1983, the body of Eunice Graster was found by police in the basement of the Reno Hotel in Cleveland, where she had been employed as a desk clerk. She had been shot to death. Between $500 and $900 was missing from the hotel coffers.

Shortly after the murder, law enforcement authorities caused a warrant to be issued for the arrest of appellant, Gary Johnson. On May 3, 1983, appellant, having learned of the warrant, voluntarily surrendered to police. On that day he was indicted for aggravated murder with two specifications: (1) that appellant was committing or attempting to commit or fleeing immediately after committing or attempting to commit aggravated robbery, and (2) that appellant had a firearm on or about his person or under his control. Appellant was also charged with aggravated robbery.

Before jury selection began, one of appellant's attorneys informed the court that new evidence had been discovered, that the defense had not received all evidence requested during the discovery proceedings, and that the defense had just been informed that there were other persons inside the small hotel at the time of the murder[1] but the defense had not had a chance to ascertain their identities or otherwise investigate them. Consequently, the defense requested a continuance of one week. The trial judge refused, expressing the view that the prosecution had only circumstantial evidence, and that no fingerprints belonging to appellant had been found

[1] The registration card file showed that five couples had checked into the Reno Hotel during Eunice Graster's work shift on April 26, 1983. Two "Smith" couples, a "Jones" couple, and an "Anderson" couple had all checked out by the time of the murder. A "Mr. and Mrs. Sal Arnold," however, had checked into Room 23, and were still in the building when Graster was killed. A police officer who was present at the murder scene testified that he observed two persons leave the hotel. They were not stopped or questioned, nor was Room 23 secured or searched.

...respect also that today's decision represents, to the best of our abilities, an objective, impartial, and unprejudiced review of the conviction and sentence given to this appellant.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

SWEENEY, LOCHER, C. BROWN and J. P. CELEBREZZE, JJ., concur.

W. BROWN and HOLMES, JJ., concur in the syllabus and judgment only.

THE STATE OF OHIO, APPELLEE, v. MAURER, APPELLANT.

[Cite as State v. Maurer (1984), 15 Ohio St. 3d 239.]

Criminal law—Aggravated murder—Capital punishment—Constitutional—Procedure.

6 Jur 3d Criminal Law §§ 1783, 1784, 1844.5, 1845.

1. Ohio's statutory framework for imposition of capital punishment, as adopted by the General Assembly effective October 19, 1981, and in the context of the arguments raised herein, does not violate the Eighth and Fourteenth Amendments to the United States Constitution or any provision of the Ohio Constitution. (*State* v. *Jenkins*, 15 Ohio St. 3d 164, paragraph one of the syllabus, followed.)
2. To death-qualify a jury prior to the guilt phase of a bifurcated capital prosecution does not deny a capital defendant a trial by an impartial jury. (*State* v. *Jenkins*, 15 Ohio St. 3d 164, paragraph two of the syllabus, followed.)
3. The trial court, when it imposes a sentence of death, shall state in a separate opinion its specific findings as to the existence of any mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why these aggravating circumstances were sufficient to outweigh the mitigating factors.
4. R.C. 2929.05 requires the court of appeals, and the Supreme Court as well, to independently weigh all the facts and other evidence in the record in determining whether the aggravating circumstances outweigh the mitigating factors in reviewing the sentencing court's determination. As a necessary corollary to that requirement, the court of appeals and the Supreme Court must articulate the reasons why the aggravating circumstances outweigh the mitigating factors.
5. A capital defendant is not entitled to a special verdict on the question of intent to kill at the guilt phase of a capital prosecution. (*State* v. *Jenkins*, 15 Ohio St. 3d 164, paragraph nine of the syllabus, followed.)
6. The standard of proof in a capital prosecution is proof beyond a reasonable doubt as defined in R.C. 2901.05 and not proof beyond all doubt. (*State* v. *Jenkins*, 15 Ohio St. 3d 164, paragraph eight of the syllabus, followed.)
7. Properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting the trier of fact to determine the issues or are illustrative of testimony and other evidence, as long as the danger of material prejudice to a defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number.

(No. 84-642—Decided December 20, 1984.)

Lockhart (C.A. 8, 1983), 714 F. 2d 1455, the defendant was sentenced to die. His attorney had failed to investigate defendant's background and offered no evidence in mitigation. The circuit court viewed this as an abdication by the attorney of his responsibility toward his client, which resulted in imposition of the death penalty by default.

"* * * Given the severity of the potential sentence and the reality that the *life of* * * * [the defendant] was at stake, we find that it was incumbent upon * * * [his] counsel to offer mitigating *proof*. There exists no indication in the *record* that * * * [counsel] made any tactical decision; it appears much more likely that he abdicated all responsibility for defending his client in the sentencing phase. We cannot view such an abdication as meeting the level of effective assistance required under the sixth amendment. * * * [I]t is only *after* a full investigation of *all* the mitigating circumstances that counsel can make an informed, tactical decision about which information would be most helpful to the client's case. In the present case, it is undisputed counsel failed to make *any* investigation whatsoever. * * * He was left with no case to present. A total abdication of duty should never be viewed as permissible trial strategy. * * * Here, counsel's default deprived * * * [the defendant] of the possibility of bringing out even a single mitigating factor. Mitigating evidence clearly would have been admissible. * * * The jury would have considered it and possibly been influenced by it. * * * We find that * * * [the defendant] was actually and substantially prejudiced in the penalty phase of the case." *Id.* at 1467. (Emphasis sic.) See, also, *Blake* v. *Kemp* (C.A. 11, 1985), 758 F. 2d 523, certiorari denied (1985), ___ U.S. ___, 88 L. Ed. 2d 367; *King* v. *Strickland* (C.A. 11, 1983), 714 F. 2d 1481.

It is quite clear from the foregoing that the duty of defense counsel to investigate his client's background for mitigating factors is an indispensable component of the constitutional requirement that a criminal defendant — and particularly one on trial for his life — be afforded effective representation and assistance from his lawyer. The maladroit presentation offered by appellant's attorneys in the sentencing phase did not, by any standard, meet that requirement. No mitigating evidence of any kind was offered. No continuance was requested for purposes of investigating appellant's background for mitigating factors. The only "evidence" for the defense heard by the jury was a lengthy unsworn statement by appellant protesting his innocence, followed by a closing argument by defense

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tunity to do so was given. Defendants were immediately hurried to trial. * * * [A] defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense." There, quoting a Pennsylvania case with approval, Justice Sutherland declared: " 'It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case. * * *' " *Id.* at 59.

We feel that, under the circumstances of the instant cause, a finding of presumed prejudice to the appellant is justified.

counsel in a similar vein, actually berating the jurors for their guilty verdict and repeatedly urging them to "reconsider the evidence." These statements were not only pointless at that stage, but almost certainly prejudiced appellant by making the jurors feel that their integrity was being impugned. Given that appellant's attorneys had a particular duty to render meaningful assistance to appellant, their failure to investigate appellant's background to obtain mitigating evidence, combined with the inept presentation of pointless and provocative statements by both appellant and counsel to the jury, compels us to conclude that appellant was deprived of the effective assistance of his counsel at the penalty phase of this proceeding.

Furthermore, it is well recognized that a duty rests on the trial court, as well as on the defendant's counsel, to take special care to see that an accused's rights are properly protected. *Powell* v. *Alabama* (1932), 287 U.S. 45. The lesson of *Powell* is that a trial judge must exercise extreme caution to ensure that full justice is accorded to the accused and that defense counsel is not unfairly handicapped in his presentation of defendant's case to the jury. Under the circumstances of this case, we believe that the trial court erred in setting the sentencing hearing too soon after appellant's conviction of aggravated murder with specifications.

The record reflects that the trial judge had been advised by counsel for appellant that there was a complete lack of preparation on the part of defense counsel for the penalty phase. R.C. 2929.024 requires the court to provide the services necessary for effective representation at the sentencing stage of an aggravated murder case. The statutory scheme is effectuated further by R.C. 2929.03(D)(1) which provides that "[t]he defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. * * *" These statutes implicitly require a reasonable time to prepare for the presentation of mitigating evidence. In our view, appellant was deprived of meaningful assistance of counsel at this critical stage of the proceeding. It is a vain act to give the accused a sentencing hearing with no opportunity to prepare for it, or to guarantee him counsel without giving such counsel a reasonable opportunity to explore and investigate potential mitigating factors.

We hasten to add that the mere failure to present mitigating evidence at the penalty phase of a capital trial does not itself constitute proof of ineffective assistance of counsel or deprivation of the accused's right to a fair trial. It is conceivable that the omission of such evidence in an appropriate case could be in response to the demands of the accused or the result of a tactical, informed decision by counsel, completely consonant with his duties to represent the accused effectively. The totality of the circumstances herein, however, forces us to conclude that the instant cause

at the crime scene. In view of defense counsel's expertise and experience in criminal cases, the judge stated he could see no compelling reason for granting a continuance. The court then overruled defense counsel's alternative motion to be excused from the case for the reason that they could not provide appellant with the effective assistance of counsel.

Trial by jury commenced on October 3, 1983, and ended with verdicts of guilty on the afternoon of October 13. Immediately after the verdict was returned, the trial judge asked defense counsel if they had any requests before the mitigation hearing. One of appellant's attorneys moved for a recess of "ten minutes or so * * * to explain to * * * [the defendant] what our position is * * * and we would like for him to consider what action we would like for him to take." After a short adjournment, the penalty phase of the proceeding was set for 9:00 the following morning.

During the penalty stage, the prosecution produced and examined two witnesses and offered four exhibits. The defense presented only the unsworn statement of the appellant. No witnesses, no exhibits nor evidence of any kind in mitigation was offered to the court and jury. The jury found that the state had proved the two specifications beyond a reasonable doubt, and that they, when pitted against the mitigating "evidence," overcame the mitigating factors. The jury recommended the death penalty. The trial court, in the separate opinion mandated by law,[1] adopted the jury's recommendations and imposed the death sentence.

The court of appeals affirmed appellant's convictions and sentence.

The cause is now before this court upon an appeal as of right.

John T. Corrigan, prosecuting attorney, and *Allan B. Levenberg*, for appellee.

James R. Willis, for appellant.

CLIFFORD F. BROWN, J. This court has thoroughly and painstakingly reviewed the entire record in this case. Because we are convinced that the record affirmatively demonstrates that appellant was denied his constitutional right to the effective assistance of counsel, we hereby reverse appellant's convictions, vacate the death sentence, and remand the cause for further proceedings.

We turn our attention first to the failure of defense counsel to conduct any investigation into appellant's background for purposes of obtaining evidence in mitigation, and their resulting failure to present any such evidence at the penalty stage of the proceeding.

Our examination of the record reveals that counsel for the defense openly stated to the court that he had not even discussed with his client the penalty aspect of the case.[2] Counsel then asked for, and was given, a

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[1] See R.C. 2929.04(F).

[2] Specifically, defense counsel's statement was as follows:
"We would like to have an opportunity to * * * the hearing. I anticipate that it will not be an

ten-minute recess. Following this recess, the trial court, with the acquiescence of defense counsel, set the hearing for the very next day. At the hearing, the defense presented only the unsworn statement of appellant. No mitigating evidence of any kind was offered.

This scenario, depicting as it does the complete lack of preparation and zeal on the part of defense counsel regarding the question of whether their client should live or die, compels the conclusion that appellant was deprived of any effective, meaningful assistance from his counsel at this obviously critical stage of the proceedings.

" 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.' " *United States* v. *Cronic* (1984), 466 U.S. 648, 654, quoting Schaefer, Federalism and State Criminal Procedure (1956), 70 Harv. L. Rev. 1, 8. "Unless the accused receives the effective assistance of counsel, 'a serious risk of injustice infects the trial itself.' " *Cronic*, *supra*, at 656, quoting *Cuyler* v. *Sullivan* (1980), 446 U.S. 335, 343.

The United States Supreme Court has found that "[f]or purposes of describing counsel's duties * * * [a] capital sentencing proceeding need not be distinguished from an ordinary trial." *Strickland* v. *Washington* (1984), 466 U.S. 668, 687. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. A lawyer has a duty to investigate "the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. * * *" 1 A.B.A. Standards for Criminal Justice (1982 Supp.), No. 4-4.1.

In cases similar to the one at bar, the federal courts have held that a lack of reasonable investigation and preparation for the sentencing phase of a capital trial constitutes ineffective assistance of counsel.[4] In *Pickens* v.

"I have not had an opportunity to discuss it with the defendant.
"I would request that maybe I can have ten minutes or so with the defendant to explain to him what our position is and what we anticipate happening with the mitigation hearing and we would like for him to consider what action we would like for him to take."

[4] Generally, claims of ineffective assistance of counsel are evaluated by a two-part test: "First, the defendant must show that counsel's performance was deficient. * * * Second, the defendant must show that the deficient performance prejudiced the defense. * * *" *Strickland* v. *Washington* (1984), 466 U.S. 668, 687. Accord *State* v. *Lytle* (1976), 48 Ohio St. 2d 391, 396-397 [2 O.O.3d 495]. However, there are exceptions to this "cause and prejudice" test. In *United States* v. *Cronic* (1984), 466 U.S. 648, 659-662, the Supreme Court noted that there are "some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell* v. *Alabama*, 287 U.S. 45 (1932), was such a case." As stated by Justice Sutherland in *Powell* at 58-59: "It is not enough to assume that counsel * * * thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough investigation might disclose * * *."

death." (*Jurek* v. *Texas* [1976], 428 U.S. 262, at pp. 273-274 * * *.) That requirement is not met in a system where the jury considers the same act or an indivisible course of conduct to be more than one special circumstance.' " *Jenkins*, *supra*, quoting *People* v. *Harris* (1984), 36 Cal. 3d 36, 201 Cal. Rptr. 782, 798, 679 P. 2d 433, 449. The inclusion of a non-statutory aggravating factor creates a situation where a jury can deviate from the guidance provided by statute. The result may be an "arbitrary and capricious infliction of the death penalty" contrary to the dictates of *Godfrey*, *supra*.

The inescapable conclusion is that it was error to submit the non-statutory aggravating factor to the jury for its consideration in the penalty phase of the trial. Because the penalty of death is "qualitatively different from a sentence of imprisonment, however long[,] * * * there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina* (1976), 428 U.S. 280, 305. Presenting the jury with specifications not permitted by statute impermissibly tips the scales in favor of death, and essentially undermines the required reliability in the jury's determination.

Under the facts at bar, the failure of appellant's attorneys to object to the submission to the jury of a non-statutory aggravating factor in the penalty phase of a capital trial constitutes ineffective assistance of counsel according to the principles discussed *supra*. Where absolutely no evidence in mitigation is offered by the defense, and no attempt is made to prevent the cumulation of impermissible aggravating factors, the defendant is exposed to an inexcusably heightened probability of receiving a sentence of death. We cannot characterize this total abandonment of appellant's defense at such a critical stage as even approaching the effective assistance of counsel. Appellant's sentence of death is therefore vacated.

We now turn to a consideration of whether the trial court's denial of defense counsel's request for a continuance at the guilt phase of the proceeding constituted reversible error. For the following reasons, we find that it does, and we accordingly reverse appellant's convictions.

In making this motion for a continuance, defense counsel stated to the court that certain newly discovered material evidence had come to light that defense counsel had not had an opportunity to evaluate or investigate. This evidence involved the presence of other, unidentified persons in the small hotel at the time of the murder, who had not been stopped or questioned by police. Defense counsel requested a one-week continuance to investigate this new evidence. In overruling this motion, the trial court noted that the state's case in "largely, if not entirely, circumstantial," and that in view of defense counsel's expertise and experience in criminal cases, he could not see any compelling reason for granting a continuance at that time.

However, this court is convinced that the trial court's refusal to grant a continuance deprived appellant of a fair trial. As the trial judge

acknowledged, the evidence offered by the prosecution was almost entirely circumstantial. In such cases, the court should utilize the utmost care to ensure that a defendant is afforded every opportunity to demonstrate that such evidence is consistent with a theory of innocence. This is particularly true where a penalty of death is a possibility. Thorough investigation of all pertinent facts is crucial in a case such as the one at bar where a theory of innocence is supported by numerous facts.[3] The refusal of the trial court to allow appellant's attorneys time to investigate the possibly vital facts surrounding the presence of two unidentified, unquestioned persons at the hotel at the time of the murder substantially prejudiced appellant's ability to present a complete defense, and deprived him of the effective assistance of his counsel.

In *State* v. *Price* (1973), 34 Ohio St. 2d 43 [63 O.O.2d 82], this court held that a denial of a continuance is not an abuse of discretion where movant's counsel asserts to the court that he is in fact prepared for trial. Here, appellant's counsel protested to the court that they were not prepared to go forward because of the lack of time to complete the investigations, and that without a continuance they could not provide their client with effective assistance in his defense. Although a motion for a continuance is addressed to the sound discretion of the trial court, *State* v. *Unger* (1981), 67 Ohio St. 2d 65 [21 O.O.3d 41], we find that under these circumstances the ends of justice required that appellant be granted additional time to pursue this potentially crucial evidence. See R.C. 2945.02. We therefore conclude that the trial court abused its discretion in refusing to grant the requested continuance.

In conclusion, based on the foregoing reasons, appellant's convictions are reversed, and the sentence of death is vacated. The cause is hereby remanded to the trial court for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

CELEBREZZE, C.J., SWEENEY and LOCHER, JJ., concur.

CELEBREZZE, C.J., concurs separately.

WRIGHT, J., concurs in part and dissents in part.

HOLMES and DOUGLAS, JJ., dissent.

[3] For example, no fingerprints of appellant were found on the cash box, emptied during the robbery, or on the front doors of the Reno Hotel through which appellant supposedly escaped after committing the robbery and murder. No witness testified that appellant wore gloves that day. Not a trace of blood was found on the coat appellant was wearing at the time, although the victim had been shot five times at close range. Dirt particles found on the victim's body and on appellant's coat were found to be inconsistent. The murder weapon was never found. There is virtually no physical evidence which placed appellant inside the hotel on the day [illegible]

illustrates the utter lack of informed, calculated decision-making on the part of counsel in the penalty phase of appellant's capital trial.[5]

We are also gravely concerned with the failure of counsel to object to the inclusion in the indictment, and the submission to the jury at both the guilt and penalty stage, of specification number two, alleging that appellant "had a firearm on or about his person or under his control * * *." This specification is not among the aggravating circumstances enumerated by the General Assembly in R.C. 2929.04(A).[6] R.C. 2941.14

[5] Our conclusion that the absence of mitigating evidence was not the result of an informed, tactical decision on the part of counsel is buttressed by the record in this case. For example, the record discloses the following potentially mitigating circumstances:

(1) appellant's family was close-knit and highly supportive of one another;

(2) appellant's psychiatric examination indicated no emotional or mental problems;

(3) appellant graduated from high school, attended a trade school, worked for seven years in a foundry, and at one time owned his own home;

(4) appellant was married and has a young daughter;

(5) appellant had experienced difficulty with drug abuse which he has apparently conquered;

(6) appellant lost an eye at the age of ten, spent months in the hospital, and was consequently denied promotion to the next grade;

(7) appellant's mother was a nurse at St. Luke's Hospital before her death from cancer a year before appellant's trial; and

(8) appellant turned himself in voluntarily to the police when he learned of the warrant for his arrest.

All of these circumstances would be relevant in mitigation. Yet absolutely no evidence on these factors was presented to the jury. This, combined with the statements by counsel indicating their failure to prepare for the penalty phase, strongly indicates that the complete absence of mitigating evidence did not result from a considered strategic judgment on the part of counsel.

[6] The aggravating circumstances listed in R.C. 2929.04(A) are as follows:

"(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

"(2) The offense was committed for hire.

"(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

"(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

"(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

"(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or

(B), pertaining to allegations to be included in an aggravated murder indictment, states:

"Imposition of the death penalty for aggravated murder is precluded unless the indictment or count in the indictment charging the offense specifies one or more of the aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code."

R.C. 2901.04(A) mandates that "[s]ections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." Viewed in this light, R.C. 2941.14(B) limits the aggravating circumstances which may be considered in imposing the death penalty to those specifically enumerated in R.C. 2929.04(A).

This conclusion was at least implicitly recognized by this court in *State* v. *Jenkins* (1984), 15 Ohio St. 3d 164, certiorari denied (1985), ____ U.S. ____, 87 L. Ed. 2d 643. This court observed at 207:

"The statutory framework in Florida discussed in *Barclay* [v. *Florida* (1983), 463 U.S. 939] is similar to Ohio's. *Like* in Ohio, *the statute precluded consideration of non-statutory aggravating circumstances* * * *." (Emphasis added.)

Indeed, the Eighth and Fourteenth Amendments to the United States Constitution would appear to preclude the inclusion of non-statutory aggravating specifications. Pursuant to *Furman* v. *Georgia* (1972), 408 U.S. 238, and its progeny, the United States Supreme Court has directed that jury discretion in capital sentencing be sufficiently guided so as to avoid the arbitrary and selective imposition of the death penalty. In *State* v. *Jenkins*, *supra*, at 196, a California decision was discussed and quoted:

" 'The use in the penalty phase of both these special circumstance allegations thus artificially inflates the particular circumstances of the crime and strays from the high court's mandate that the state "tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." (*Godfrey* v. *Georgia* [1980], 446 U.S. 420 at p. 428. * * *) The United States Supreme Court requires that the capital-sentencing procedure must be one that "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of

"(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

"(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed to [illegible]

effective assistance. Even the state acknowledges that the firearm specification should not have been submitted to the jury as an aggravating circumstance. Yet, appellant's counsel failed to recognize the error and to object to it at the three most critical stages of this prosecution: indictment, guilt phase of trial, and penalty phase.

Finally, I join in the conclusion that the trial court's failure to grant the pretrial continuance requested by appellant's attorneys was an abuse of discretion. We recognize that at some point trial dates must be set and held. It must be taken into consideration, however, that the attorneys moved for a continuance of only one week. In this regard, Justice Sutherland's observations in *Powell* v. *Alabama*, *supra*, are particularly appropriate:

"It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. * * * The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to * * * prepare his defense." *Id.* at 59.

It may be, as the state asserted, that appellant's counsel could have learned of the presence of two registered guests at the hotel prior to the request for continuance. Nevertheless, it is clear from the record that counsel were not made aware of this "newly discovered evidence" and, upon discovery, considered themselves ill-prepared without further investigation. The requested continuance of one week was not unreasonable even if due in part to some alleged lack of diligence on the part of counsel. Appellant's guilt or innocence was at issue, not the efficiency of appellant's attorneys or the prosecution.

In summary, I too am aware of the admonition of the United States Supreme Court that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland*, *supra*, at 689. I adhere to this position lest we face a proliferation of ineffectiveness claims in which "[c]riminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense." *Id.* at 690.

In the case *sub judice*, however, the instances of counsel's ineffectiveness are so compelling that I must agree in this instance that "it is unfair to hang the client because of the fault of the attorney * * *." *Commonwealth* v. *Bell* (1965), 417 Pa. 291, 297, 208 A. 2d 865, 869, Bloznansky, J., dissenting.

For the foregoing reasons I respectfully concur.

WRIGHT, J., concurring in part and dissenting in part. I concur in Justice Douglas' well-reasoned dissent from the majority's reversal of appellant's conviction. However, under the circumstances disclosed I think the trial court's failure to provide counsel reasonable time and opportunity to prepare and present evidence in mitigation of the imposition of the death sentence was a clear denial of due process. The absence of any mitigation evidence under the circumstances of this case suggests that Johnson was deprived of the effective assistance of counsel at a critical stage of the trial proceedings.

The majority opinion states with clarity that the presentation of little or no evidence in mitigation does *not* in and of itself constitute ineffective assistance of counsel. Justice Douglas resolutely argues that counsel for appellant made a reasoned decision to follow such a course. I find such a conclusion difficult to accept given the time frame of the guilty finding, lack of consultation with appellant, the appellant's background, and the timing of the mitigation hearing.

I would limit our holding to a finding that the trial court committed reversible error in failing to protect appellant's constitutional right to a fair trial and effective assistance of counsel. A duty rests on the court to see that an accused's rights are upheld. *Powell* v. *Alabama* (1932), 287 U.S. 45. The Fifth Circuit Court of Appeals addressed this issue directly in *United States, ex rel. Rees*, v. *Wainwright* (C.A. 5, 1976), 525 F. 2d 1269, when it stated at 1273:

"* * * [T]he right to effective assistance of counsel is safeguarded both by the due process clause of the Fourteenth Amendment standing alone and by the Sixth Amendment guarantee of effective representation (applied to the states through the Fourteenth Amendment). When defense counsel's representation is so blatantly incompetent as to render the whole proceeding fundamentally unfair, the due process clause itself is violated. When, however, the aggregate of retained counsel's alleged errors does not rise (or sink) to the level of fundamental unfairness, in order to support a finding of a Sixth Amendment violation there must be a showing that the state was somehow involved in the ineffective representation:

" 'To find state involvement in retained counsel's conduct which is adjudged to be less than reasonably effective, yet not so grossly deficient as to render the proceedings fundamentally unfair, it must be shown that some responsible state official connected with the criminal proceeding who could have remedied the conduct failed in his duty to accord justice to the accused. That the trial judge and the prosecutor have such a capacity and duty is unquestionable. Therefore, if the trial judge or the prosecutor can be shown to have actually known that a particular defendant is receiving incompetent representation and takes no remedial action, the state action requirement is satisfied. * * *' "

The constitutional guarantee of effective assistance of counsel is generally taken to mean such assistance that the rights of the accused are properly safeguarded and his defense is competently and zealously presented. *Johnson* v. *Zerbst* (1938), 304 U.S. 458. If an attorney's performance in representing an accused is such as to amount to no representation at all, the accused has clearly been deprived of effective representation. *United States* v. *Williams* (C.A. 9, 1972), 455 F. 2d 361, certiorari

CELEBREZZE, C.J., concurring. Justice Brown's majority opinion carefully focuses on the critical issue before us for review — the conduct of appellant's defense counsel in the case *sub judice*. I concur in his analysis of the relevant law and support the conclusion that appellant was denied the fundamental right to the effective assistance of counsel. *

Appellant's central claim is based on the denial of the effective assistance of counsel in the penalty phase of his capital trial. This same issue was before the United States Supreme Court in *Strickland* v. *Washington* (1984), 466 U.S. 668. In *Strickland*, the defendant pleaded guilty to three capital murder charges. The only evidence presented in mitigation at the sentencing hearing was a plea for mercy from counsel stressing the defendant's willingness to accept responsibility for the crimes and his remorse. The trial judge found that the aggravating circumstances outweighed the mitigating factors and sentenced the defendant to die.

Defendant subsequently sought habeas corpus relief, claiming that counsel had rendered ineffective assistance at the sentencing proceeding. The Supreme Court found this claim to be without merit. The record before the court showed that, in preparation for sentencing, counsel had conferred with the defendant, his wife and his mother about the defendant's background. Counsel decided on the basis of those conversations not to request a psychiatric report for two reasons: first, there was no indication that defendant had psychological problems and second, counsel did not wish to give the state the opportunity to put on psychiatric evidence of its own. Counsel also decided not to request a presentence report in order to avoid mentioning defendant's prior criminal history. Counsel formulated a strategy for his argument which highlighted defendant's remorse and acceptance of responsibility based on the trial judge's reputation as one who responded favorably to defendants who "owned up" to their crimes. After considerable investigation and thought, counsel determined to forego other evidence in mitigation in the belief that his argument would provide the best chance to spare the defendant's life. *Id.* at 673. The Supreme Court found ample evidence that counsel had fulfilled his duty to make reasonable investigation or to make a reasonable decision that a particular investigation was not necessary:

"On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment." *Id.* at 699.

The performance of Strickland's counsel is in clear contrast to the case *sub judice*. There is a complete lack of evidence in the record before us that counsel's conduct of the penalty phase of appellant's trial was the result of any reasonable professional *judgment*. The insinuation that counsel's failure to present any evidence in mitigation was a strategic decision reached after some reasonable deliberation and investigation is simply

misguided. Any conjecture that counsel must have "actually considered and rejected the presentation of character witnesses in the penalty phase of this trial, based solely on the fact that counsel and appellant were personal acquaintances, is pure speculation which has no place in the review of a capital case.

There is no evidence in this case, as in *Strickland*, that appellant's counsel investigated the possibility of presenting the results of a psychological examination or a presentence report in mitigation. There is no evidence here, as in *Strickland*, that counsel investigated the members of appellant's family and others as potential witnesses in mitigation. There is no evidence in the case *sub judice*, as in *Strickland*, that counsel conferred at length with appellant and apprised him of the nature of the evidence to be presented in the penalty phase of his trial. Instead, there is evidence in the record before us that appellant's counsel had not made reasonable preparation or investigation for the mitigation hearing. When the trial court asked if counsel had any requests prior to commencement of the penalty phase, appellant's counsel, Farris Williams, informed the court that he had *not even discussed the mitigation presentation with appellant* and then *requested just ten minutes* to do so.

The result of this lack of reasonable preparation and investigation on the part of appellant's counsel was that no evidence in mitigation was offered. Rather, appellant's counsel, Fred Middleton, allowed his own and appellant's presentations in mitigation to degenerate into a rambling denunciation of the jury for its finding of guilt. The remarks of both appellant and his counsel demonstrate that counsel was entirely unprepared for, and indeed misunderstood, the nature of the penalty phase of this trial. As in *Powell* v. *Alabama* (1932), 287 U.S. 45, counsel's lack of preparation and investigation so tainted the criminal process in the case *sub judice* that prejudice to appellant can be presumed. See, also, *United States* v. *Cronic* (1984), 466 U.S. 648; *Kemp* v. *Blake* (C.A. 11, 1985), 758 F. 2d 523, certiorari denied (1985), ____ U.S. ____, 88 L. Ed. 2d 367.*

As the majority also aptly illustrates, counsel's conduct at the penalty phase of appellant's trial was not the only instance of failure to render ef-

* In this writer's opinion, it would be a rare case where presentation of mitigation evidence, no matter how meager, would be inappropriate. For example, assuming arguendo that appellant had demonstrated a spirit of cooperation with authorities during his pretrial incarceration, this fact would have been appropriate for consideration by the jury during the penalty phase.

The United States Supreme Court recognized the importance of such evidence in *Skipper* v. *South Carolina* (1986), ____ U.S. ____, 54 U.S.L.W. 4403. In *Skipper* the court reversed the trial court's exclusion from the sentencing phase of a capital trial defendant's proffer of testimony from two of his jailers and a "regular visitor" to the effect that defendant had "made a good adjustment" to jail life while awaiting trial. The high court stated that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison *is itself* an aspect of his character that is by its nature relevant to the sentencing determination." *Id.* at 4405.

the evidence. Proposition of Law No. I deals with ineffective assistance of counsel in the penalty stage. Proposition No. II relates to the propriety (or impropriety) of the trial judge in submitting to the jury an offense, as an aggravating circumstance, that is not among those offenses listed in Ohio's capital offense law. Proposition No. III deals with the prosecutor's argument in the penalty stage. Proposition No. IV deals with the charge of the trial court during the sentencing phase. Proposition No. V raises a constitutional question as to meaningful review of the appropriateness of the sentence of death. Proposition No. VI concerns the court's instruction in the penalty stage. Proposition No. VII deals with the same issue raised in Proposition No. II. Proposition No. VIII questions the consitutionality of the law on the basis that it creates "a mandatory sentencing factor." Thus, none of the issues presented to us by appellant questions the quantity or quality of the evidence presented against him at trial.

Additionally, pursuant to statute and as a matter of general policy, this court's review in criminal cases does not include a reweighing of the evidence.* However, in reaching its decision, the majority has undertaken a reweighing of the evidence, and in light of its circumstantial nature has decided to give the appellant a second bite at the apple. Relying, in part, upon appellant's misapplications of the law relevant to this case,[10] the ma-

* R.C. 2953.02 reads in part:

"* * * The supreme court in criminal cases shall not be required to determine as to the weight of the evidence, except as provided in section 2929.05 of the Revised Code."

See, also, 27 Ohio Jurisprudence 3d (1984) 868-869, Criminal Law, Section 1536, and the cases cited therein.

In addition, as recently as March 19, 1986 in *State* v. *Jackson* (1986), 22 Ohio St. 3d 281, 285, in a *per curiam* opinion, the majority found that "[t]he weight to be given evidence and the credibility of the witnesses are primarily decisions for the jury" and cited for this proposition, with approval, *State* v. *DeHass* (1967), 10 Ohio St. 2d 230 [39 O.O.2d 366]. It appears to be fair to ask what motivates this sudden change.

[10] In support of his claim of ineffective assistance of counsel, appellant relies upon the following factually dissimilar cases cited in the majority opinion: *King* v. *Strickland* (C.A. 11, 1983), 714 F. 2d 1481; *United States* v. *Cronic* (1984), 466 U.S. 648, and *Perkins* v. *Lockhart* (C.A. 8, 1983), 714 F. 2d 1455.

The *King* court, citing *Stanley* v. *Zant* (C.A. 11, 1983), 697 F. 2d 955, 963, noted that the Supreme Court has never held counsel ineffective in a capital case solely because of failure to present mitigating evidence. The *King* court ruled that the defendant was denied ineffective assistance of counsel when counsel failed to present *available* mitigation evidence *in combination with* a closing argument which "stressed the horror of the crime and counsel's status as an appointed representative." The court ruled that the latter error, in effect, separated counsel from his client and conveyed to the jury that counsel had reluctantly represented a client who had committed a reprehensible crime.

In *Cronic*, *supra*, the Supreme Court, in remanding the case to the court of appeals, found that where the surrounding circumstances do not demonstrate that counsel fails to function *in any meaningful sense* as an adversary, the defendant could not sustain a Sixth Amendment claim of ineffective assistance of counsel without pointing out specific errors by his counsel. In the case before us, in denying defense counsel's request to withdraw from this case, the trial judge stated:

jority has acquiesced to appellant's protests of "ineffective assistance of counsel." Regrettably, the majority has failed to consider that despite the nature of the evidence, it weaves a web around appellant which includes motive, opportunity and an insider's familiarity with the layout and operation of the hotel. While the evidence was circumstantial in nature, both the jury and the trial judge saw all of it, heard all the testimony and witnessed the demeanor of all the persons present and testifying at the trial. Despite the nature of the evidence, it was sufficient to convince both the jury and the judge, in their separate and independent reviews, that appellant was guilty as charged. However unsettling it may be to uphold a conviction and death penalty based upon circumstantial evidence, there is simply no sound legal basis upon which to overrule both the trial and appellate courts' decisions.

The majority focuses first upon what it characterizes as a "*failure* of defense counsel to conduct any investigation into appellant's background for purposes of obtaining evidence in mitigation, and their [presumably] resulting failure to present any such evidence at the penalty stage of the proceeding." (Emphasis added.) Stated another way, appellant maintains,

"The defendant is represented by Fred Middleton, whose work is well known to the Court and a former Assistant County Prosecutor and a thorough seasoned trial lawyer, and Mr. Farris Williams, whose work is not known to the Court until recently, *but who was chosen to replace* Mr. DeFranco *at the direct request of the defendant* * * *.*

"At that point the defendant informed the Court that he had confidence in Mr. Williams and his ability and trustworthiness and on the basis of that, the Court did appoint him and his appearances in the court the last few weeks have tended to bear that out. *He has appeared prepared, knowledgeable, articulate, and obviously with the best interests of his client in mind at all times.*" (Emphasis added.)

The *Cronic* court also noted that every refusal to postpone a criminal trial will not give rise to an assumption that counsel's assistance was ineffective.

In *Pickens*, *supra*, at 1467, the court of appeals *specifically found that there were no facts in the record* which indicated that defense counsel made a tactical decision not to present a case in mitigation but rather it appeared "much more likely that he abdicated all responsibility for defending his client in the sentencing phase."

In the case before this court, as noted by the majority, defense counsel stated:

"I would request that maybe I can have ten minutes or so with the defendant to explain to him what our *position* is and *what we anticipate* happening with the mitigation hearing and we would like for him to consider *what action we would like for him to take.*" (Emphasis added.)

The majority interprets these remarks to mean that defense counsel was unprepared to present a case in mitigation, and could only have become prepared by conducting investigations at this point in the trial. It is just as likely that in light of the information gathered via the pretrial motions, the psychiatric evaluation, as well as the long-standing relationship existing between one of the attorneys and the appellant, that counsel and client had established a *position* in the eventuality of a guilty verdict, and that all that was needed was "ten minutes" to review that position. Additionally, it seems unlikely that counsel, who showed no reluctance to file numerous motions, and to request several continuances, would be unprepared at this point. If counsel thought they needed more time to collect information or for preparation, it seems highly unlikely, given counsel's aggressive advocacy style throughout the trial, that they would not [illegible]

denied (1972), 409 U.S. 857. The court has a duty to insure that the defendant in a criminal proceeding has the effective assistance of counsel. *Powell* v. *Alabama*, *supra*; *Ponzi* v. *Fessenden* (1922), 258 U.S. 254.

Although a trial court has very broad discretion in the procedural conduct of a trial and due process requirements may vary with the circumstances, it is essential that defense counsel in a criminal case be afforded a reasonable opportunity to prepare his case. In the instant case the preparation time for the sentencing hearing was obviously inadequate.

The trial judge had a duty to insure that appellant's rights were protected. I am painfully aware that, after conviction, counsel could make a most dangerous tactical decision and present nothing in mitigation. However, the trial court, when confronted with the peculiar circumstances at bar, had an obligation to give counsel for appellant adequate time to investigate and prepare evidence in mitigation or, at the very least, to make a record of counsel's reasons for his actions in defending his client. This standard would fulfill the mandate contained in R.C. 2929.03(D)(1). The trial court's failure to follow this procedure was reversible error.

Thus, I would affirm in part and reverse in part and remand this cause to the trial court for resentencing pursuant to R.C. 2929.06.

DOUGLAS, J., dissenting. I must respectfully dissent from the opinion of the majority.

Initially, I think it is important to set forth the facts and circumstances, conspicuously absent from the majority opinion, which led to the arrest and subsequent conviction of appellant.

The Reno Hotel, where the victim was murdered, serves primarily as a rendezvous point for prostitutes and their customers and those involved in illicit love affairs. Other than the owner, his family or hotel workers, only couples are permitted admittance to the hotel. It is not possible to enter the building unless "buzzed in" by the clerk. The hotel parking lot is situated to the side of the building, and the main entrance, used by patrons, is located on that same side. The double doors on the front of the hotel facing the street are not used and are kept locked.

On the day she was murdered, Eunice Graster was scheduled to work from 7:00 a.m. until 3:00 p.m. At about 9:25 a.m. that day, the victim's husband and two children stopped by the hotel on the way to a 10:00 a.m. appointment at the office of the W.I.C. program, a program funded by the federal government to supply nutritional foods to people who have nutritional or physical needs. Mr. Graster and the children visited for about fifteen minutes, during which visit, appellant was "buzzed" into the front door by the victim. Mrs. Graster admitted appellant to the hotel although he was unescorted, saying, "Here comes Gary." Appellant went into a nearby room and Mr. Graster and the children left.

Upon his timely arrival at the W.I.C. office, Mr. Graster realized he did not have an identification card and attempted to call his wife at the

hotel. He received no answer. Mr. Graster was informed by W.I.C. officials that the card was unnecessary, but because he had not been able to reach his wife, he tried calling her again. This second effort was also unsuccessful as was a third call, attempted after Mr. Graster returned home.

Appellant's aunt, Vera Lundy, a maid at the hotel, arrived for work at a few minutes past 10:00 a.m. on the day of the murder. She tried to get into the hotel at the main entrance, but no one was in the office to permit her entry. After pounding on the door and shouting for Mrs. Graster, Lundy went to the back door and attempted to get in. There, too, she was unsuccessful. Lundy walked to the front of the hotel where she saw the front doors unbolted and standing open. Appellant was coming down the front steps. Lundy testified that she asked appellant if he had been in the hotel and that he answered, "No." When she asked appellant to go inside the hotel with her to help her find Mrs. Graster, appellant refused saying that he did not want to be blamed "for nothing that happened in that hotel."

On the morning of the murder, an unmarked police car was parked outside the hotel. Inside the vehicle were three police detectives; there also was a prostitute who had been arrested that morning. Two of the officers testified at the trial that the hotel was under surveillance. During this watch, both officers testified that they observed appellant coming across the front lawn of the hotel with a yellow envelope in his hand. The envelope was the kind in which the hotel's cash receipts were kept. The police observed appellant's brief conversation with Lundy, and watched appellant walk away. Shortly after, the police officers left the scene.

The conversation between appellant and Lundy was also observed by John Williams, a paver hired to resurface the hotel parking lot. Williams testified that he saw appellant walking along the sidewalk but saw nothing in his hand. Other witnesses testified as to appellant's whereabouts, activities, actions and conversation on the day of the murder.

Shortly after the murder, a warrant was issued for appellant's arrest. Appellant was charged with aggravated murder with specifications that the aggravated murder was committed while appellant was committing or attempting to commit or fleeing immediately after committing or attempting to commit aggravated robbery and that during the course of committing these crimes, appellant had a firearm on or about his person or under his control, all in violation of R.C. 2903.01, 2929.04 and 2929.71. Appellant, in a second count, was also charged with aggravated robbery, a violation of R.C. 2911.01. On May 3, 1983, appellant, having learned of the warrant, turned himself in to the police. After trial, the jury, on October 13, 1983, returned its verdict of guilty on all counts.

Initially it must be noted that appellant himself has never taken direct exception to his conviction and sentence based upon the nature or sufficiency of the evidence. Appellant presents to this court eight propositions of law—none of which raises the question as to the weight or sufficiency of

tant i need to have some one i feel is going to do the best job he can for me. Some one *who knows me* and believes in me and this person i trust with my Life is Farris Williams * * * *he has been my lawer for over four years* and he will take my case if he is allowed to do so * * *."[2] (Emphasis added.)

A quite reasonable assumption based on appellant's letter is that attorney Williams was very familiar with appellant's background and could make an informed decision as to whether there was relevant or helpful evidence to present in mitigation.

Appellant failed to inform this court about what mitigation evidence could have been presented and was not, and the facts point more clearly to the possibility that defense counsel simply thought that the best strategy was to proceed as they did, with only appellant's unsworn statement. Perhaps this was not the best strategy, but as noted by the *Strickland* court at 689:

"* * * A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' * * *" (Citation omitted.) See, also, *State* v. *Clayton* (1980), 62 Ohio St. 2d 45, 49 [16 O.O.3d 35], where this court, quoting *State* v. *Lytle* (1976), 48 Ohio St. 2d 391, 396 [2 O.O.3d 495], stated:

" 'We deem it misleading to decide an issue of competency by using, as a measuring rod, only those criteria defined as the best available practices in the defense field.' " (Emphasis deleted.)

In summary, the facts simply do not support the majority's holding that defense counsel's failure to conduct other investigations, specifically just prior to the sentencing trial, and their failure to present mitigation testimony other than appellant's statement, *per se* constitute ineffective assistance of counsel.

The majority next accepts appellant's contention that he was denied a fair trial when his counsel failed to object to, or prevent the submission to the jury of, a non-statutory aggravating circumstance as a basis for the death penalty.

Appellant is correct in stating that the second specification to count one of the indictment, to wit: "* * * that the offender Gary Johnson had a firearm on or about his person or under his control while committing the offense charged * * *," should not have been submitted to the jury as an aggravating factor which subjects the appellant to the death penalty. Clearly, pursuant to R.C. 2929.04, this is not one of the seven enumerated factors.

However, as stated by the appellate court, consideration of a non-statutory aggravating factor does not warrant reversal of the death penalty in this case.

Appellant's reliance on *Zant* v. *Stephens* (1983), 462 U.S. 862, is clearly misplaced. In upholding the death penalty in *Zant*, the Supreme Court stated at 881-883:

"One rule derived from the *Stromberg* [v. *California* (1931), 283 U.S. 359] case is that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground. * * *.

"The second rule derived from the *Stromberg* case is illustrated by *Thomas* v. *Collins*, 323 U.S. 516, 528-529 * * * and *Street* v. *New York*, 394 U.S. 576 * * *.

"The court's opinion in *Street* explained:

" 'We take the rationale of *Thomas* to be that when a single-count indictment or information charges the commission of a crime by virtue of the defendant's having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as "intertwined" and have rested the conviction on both together. * * * *There is no comparable hazard when the indictment or information is in several counts and the conviction is explicitly declared to rest on findings of guilt on certain of these counts, for in such instances there is positive evidence that the trier of fact considered each count on its own merits and separately from the others.*' " (Emphasis added.)

Additionally, the *Zant* court stated at 883, fn. 21:

"* * * [This] court has held that the single sentence may stand, even if one or more of the counts is invalid, as long as one of the counts is valid and the sentence is within the range authorized by law. See *Claassen* v. *United States*, 142 U.S. 140 (1891); *Pinkerton* v. *United States*, 328 U.S. 640 (1946); *Barenblatt* v. *United States*, 360 U.S. 109 (1959)."

Moreover, appellant's argument is soundly defeated by the Supreme Court's decision in *Barclay* v. *Florida* (1983), 463 U.S. 939. In *Barclay*, the Supreme Court specifically addressed the issue of whether Florida could constitutionally impose the death sentence when one of the aggravating circumstances relied upon in imposing death was not among those established by Florida statute. The Supreme Court affirmed the imposition of death noting first at 956:

"* * * In this case, as in *Zant* v. *Stephens*, 462 U.S., at 887-888, nothing in the United States Constitution prohibited the trial court from considering * * * [the non-statutory aggravating circumstances]. The trial

[2] A copy of appellant's letter is attached to this opinion as an Appendix. See *infra* at 111.

and the majority accepts, the proposition that the fact no mitigating evidence was presented to the jury *demonstrates* that appellant's counsel failed to investigate or prepare for the mitigation phase of this trial. The majority's discussion of this issue suggests that when the penalty phase of a capital case occurs very shortly after the guilt phase, and wherein no mitigating evidence is presented, prima facie a scenario is presented which depicts "* * * [a] complete lack of preparation and zeal on the part of defense counsel regarding the question of whether their client should live or die, [and] *compels the conclusion that* * * * [an] appellant * * * [is thereby] deprived of any effective, meaningful assistance from his counsel at this obviously critical stage of the proceedings." (Emphasis added.)

The Supreme Court, in *Strickland* v. *Washington* (1984), 466 U.S. 668, 687, set forth the current two-part test for effective assistance of counsel,[1] and among other things, defined counsel's duty to prepare and conduct investigations for trial. As noted by the majority, the Supreme Court stated that the duty of defense counsel is:

"* * * [T]o make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691.

However, the majority herein conveniently omits the further teachings of the *Strickland* court wherein the court also stated:

"* * * In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*

"* * * [A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

Thus, in light of *Strickland*, *supra*, the equation drawn by the majority, to wit: no mitigating evidence equates to ineffective assistance, is impermissible without a careful look at the facts and circumstances in the case *sub judice* against which an assessment of the reasonableness of counsel's "failure" must be viewed.

Defendant was indicted on May 4, 1983. He did not come to trial until October 3, 1983, some five months later. As part of the pretrial process, the trial court appointed counsel; appointed an investigator at state expense; granted appellant's motion for a competency examination pursuant to R.C. 2945.37, 2945.371 and 2945.39; granted appellant's requests for change of counsel and appointed a new attorney of record *specifically chosen by appellant*; and ruled upon at least six other motions including appellant's motion for discovery of any exculpatory and *mitigatory* material pursuant to Crim. R. 16. Appellant's Crim. R. 16 motion, filed May 17, 1983, specifically requested that the prosecutor provide:

"All evidence known, or which may become known, to the prosecuting attorney, favorable to the defendant and *material either to guilt or punishment* * * *." (Emphasis added.)

In effect, this means that prior to trial, defense counsel must be presumed to have had in their possession background and trial information obtained from an investigator, a psychiatric report, the prosecutor, the defendant and members of the defendant's family who were also clients of attorney Farris Williams. To state then, as does the majority, that defense counsel gathered no evidence to present in mitigation, is clearly inaccurate. There is certainly no requirement that the collection of mitigatory evidence take place only after the guilt phase of the trial. On the contrary, it seems more likely that a well-prepared attorney would provide for the eventuality of a guilty verdict even as the guilt phase of the trial is in progress. Additionally, in this case, the *Strickland* court's analysis at 691 is particularly enlightening. The court stated:

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. * * * [W]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. * * *"

Likewise, counsel's knowledge of the background and history of the defendant, as it relates to the guilt or sentencing phase of the trial, influences counsel's decisions regarding when, whether or what investigations are needed. In a letter written to the trial judge requesting appointment of new counsel, appellant stated:

"This Letter Is to my judge asking that you change my Lawer whom i no longer want to handle my case for many reason this case is so impor-

[1] In *Strickland* v. *Washington* (1984), 466 U.S. 668, the court held that:

"* * * In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. * * * [*Id.* at 688.]

"* * *

"* * * The defendant [in addition] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at 694.)

judge did not consider any constitutionally protected behavior to be an aggravating circumstance. See *id.* at 884. And, again as in *Zant*, nothing in the Eighth Amendment or in Florida law prohibits the admission of * * * [the non-statutory aggravating circumstance]."

The *Barclay* court, interpreting *Proffitt* v. *Florida* (1976), 428 U.S. 242, then stated at 957, "* * * it is clear that the opinion saw no constitutional defect in a sentence based on both statutory and nonstatutory aggravating circumstances. * * *"

The death penalty statute in Florida is essentially the same as R.C. 2929.04 and the issue addressed in *Barclay* is substantially similar to the issue before this court. In the case *sub judice*, appellant was indicted on two separate counts with count one containing two specifications.

The jury was instructed to consider each count separately and render a verdict as to each. Additionally, the jury was instructed to consider the aggravating circumstances separately and to state its findings as to each "uninfluenced by your decision as to any other specification." The jury did not return a general verdict but returned guilty verdicts as to each count and each specification to count one.

Further, unlike the trial judge in *Barclay*, the trial judge in this case imposed the death penalty only on the basis of the proper aggravating circumstance, after finding beyond a reasonable doubt that it outweighs any mitigating factors. The submission to the jury of a non-statutory aggravating circumstance neither denied appellant a fair trial nor did it violate his right to due process. Therefore, there is no requirement that the death penalty be set aside.

As to whether defense counsel's failure to prevent the submission to the jury of this non-statutory aggravating factor requires this court to reverse the sentence and conviction, the holding in *Strickland*, *supra*, makes it clear that it does not. The Supreme Court stated at 687:

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Unless a defendant makes both showings*, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." (Emphasis added.)

Even if counsel's error is significant enough to meet the first prong of the *Strickland* test, appellant was not deprived of a fair trial thereby and the second prong of the test is not met.

Turning next to the guilt phase of the trial, the majority "* * * is con-

vinced that the trial court's refusal to grant a [third] continuance deprived appellant of a fair trial." The majority characterizes this refusal as an abuse of discretion because it did not "* * * allow appellant's attorneys time to investigate the *possibly* vital facts surrounding the presence of two unidentified, unquestioned persons at the hotel at the time of the murder * * *." (Emphasis added.) I strongly disagree with the majority and again point out that counsel in this case had five months to prepare for trial. During that time, they were assisted in their investigations by a private investigator. During that time, the trial date was reset three times, each rescheduling providing counsel with additional time. During that time, the state had, in its possession, the hotel registration card which evidenced the presence of the two unidentified guests, and which defense counsel characterized as "new evidence" in their request for a continuance. Again, during that time, defense counsel had the full cooperation of appellant's father, who owned the hotel, who knew of the presence of the two guests in the hotel, and who, in fact, saw this couple check out during the police investigation on the day of the murder.

In opposing defense counsel's motion for continuance on September 26, 1983, the prosecutor stated:

"The State of Ohio has formally responded to the defendant's request for discovery, something that was filed prior to Mr. Williams' [*sic*] entering the case, and the State of Ohio has stood ready and available up to today-in fact for the defense attorneys to come in and examine any of the physical exhibits that the State of Ohio has within its possession and is prepared to use at trial.

"I have asked them to please get in touch with us and we would make those things available; take them over to the police department and let them examine anything that is over in the custody of the police department, and up to today's date, that has not been done.

"There has been some mention about the card, a guest registration card, that came from the hotel in question, the scene of the crime, which the Court is now aware is owned by the defendant's father.

"*That card is one of those items that has been in the possession of the State and that they could have examined at any time.* We finally made a copy of the card and provided that to him but, again, within the rules, they are allowed to inspect and make copies of anything that the State of Ohio has, and they made no effort to communicate that they would like to examine all of the physical pieces of evidence and when it could be mutually done. Mr. Dumas had been available at the convenience of counsel and we have not heard from them." (Emphasis added.)

The Supreme Court noted in *United States* v. *Cronic* (1984), 466 U.S. 648, at 661, that:

"* * * [E]very refusal to postpone a criminal trial will not give rise to * * * [a presumption of ineffective assistance of counsel]. In *Avery* v. *Alabama*, 308 U.S. 444 (1940), counsel was appointed in a capital case only

three days before trial, and the trial court denied counsel's request for additional time to prepare. Nevertheless, *the Court held that since evidence and witnesses were easily accessible to defense counsel, the circumstances did not make it unreasonable to expect that counsel could adequately prepare for trial during that period of time* * * *." (Emphasis added.)

Certainly it was not unreasonable for the trial court to expect that counsel in this case could adequately prepare for this trial during the five months they had to do so and that this continuance was not warranted under the circumstances.

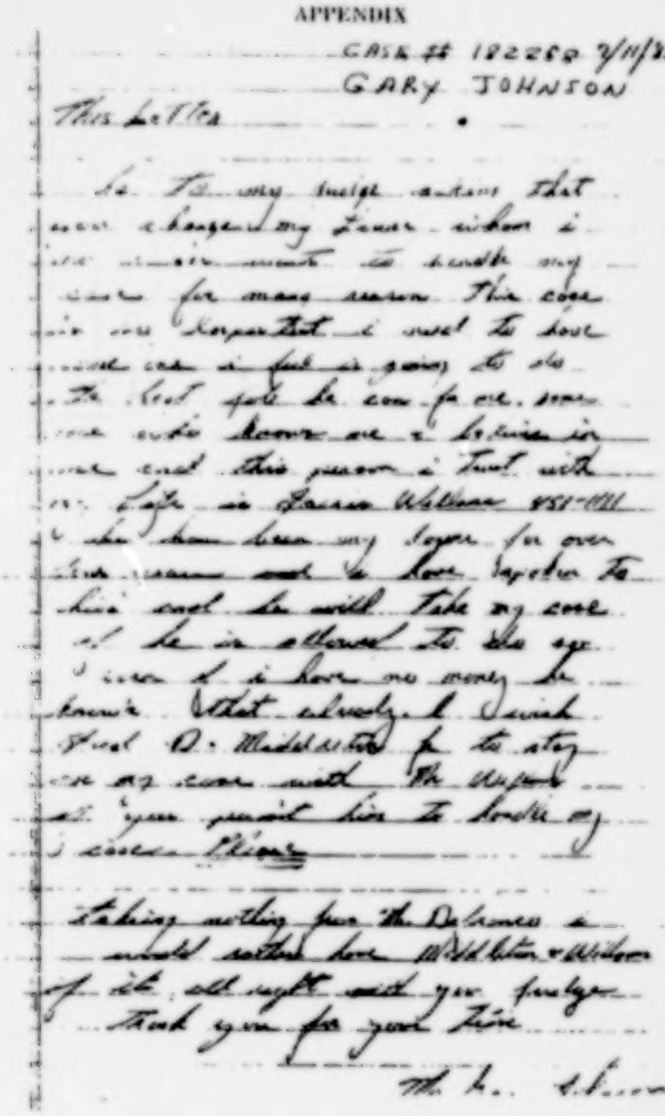
In conclusion, I have one final worry. The majority seems to express its primary concern in this case with the alleged ineffective assistance of counsel in the *penalty* stage of the proceedings. Since no statutory ground, under R.C. 2929.06, can be found to set aside the sentence of death, the majority has, instead, elected to throw out appellant's conviction in order to resolve the perceived problem. In doing so, it seems that this court is retrying the issues of fact rather than confining itself to a determination of whether there was *sufficient* evidence to have warranted the submission of the case to the jury and whether there was sufficient substantial evidence to support the verdict rendered.

If the majority really feels that there was insufficient evidence presented by the prosecution and the case against appellant was not made, then the majority should order the appellant discharged and save the people of Ohio, the trial and appellate judges and the appellant and his lawyers the time, cost and expense of arguing the motion for dismissal on double jeopardy grounds, which is sure to come. In remanding "to the trial court for further proceedings *consistent with this opinion*," the question will immediately arise in the minds of the trial court, the prosecutor and the defense attorneys herein as to what this court intends be done with appellant and this case.

For me, that question is clear from the record before us. I would affirm the verdict of the jury, the judgment of the trial court and that of the court of appeals. Accordingly, for the reasons set forth above, I must respectfully dissent.

HOLMES, J., concurs in the foregoing dissenting opinion.

APPENDIX


CASE # 182260 7/11/83
GARY JOHNSON
This Letter

UNITED STATES CONSTITUTION

AMENDMENT 9

The enumeration [illegible] *shall not be construed, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

HISTORY: 1972 H 511, eff. 1-1-74

§ 2929.02 Penalties for murder.

(A) Whoever is convicted of, pleads guilty to, or pleads no contest and is found guilty of, aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022 [2929.02.2], 2929.03, and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 [2929.02.3] or division (C) of section 2929.03 of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of, pleads guilty to, or pleads no contest and is found guilty of, murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

HISTORY: 132 v H 511 (Eff 1-1-74); 138 v S 1, (Eff 10-19-81).

§ 2929.021 [Notice to supreme court of indictments charging aggravated murder; fine.]

(A) If an indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the clerk of the court in which the indictment is filed, within fifteen days after the day on which it is filed, shall file a notice with the supreme court indicating that the indictment was filed. The notice shall be in the form prescribed by the clerk of the supreme court and shall contain, for each charge of aggravated murder with a specification, at least the following information pertaining to the charge:

(1) The name of the person charged in the indictment or count in the indictment with aggravated murder with a specification;

(2) The docket number or numbers of the case or cases arising out of the charge, if available;

(3) The court in which the case or cases will be heard;

(4) The date on which the indictment was filed.

(B) If the indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the defendant pleads guilty or no contest to any offense in the case or if the indictment or any count in the indictment is dismissed, the clerk of the court in which the plea is entered or the indictment or count is dismissed shall file a notice with the supreme court indicating what action was taken in the case. The notice shall be filed within fifteen days after the plea is entered or the indictment or count is dismissed, shall be in the form prescribed by the clerk of the supreme court, and shall contain at least the following information:

(1) The name of the person who entered the guilty or no contest plea or who is named in the indictment or count that is dismissed;

(2) The docket numbers of the case in which the guilty or no contest plea is entered or in which the indictment or count is dismissed;

(3) The sentence imposed on the offender in each case.

HISTORY: 129 v S 1, (Eff 10-19-81).

[§ 2929.02.3] § 2929.023 [Defendant may raise matter of age.]

A person charged with aggravated murder and one or more specifications of an aggravating circumstance may, at trial, raise the matter of his age at the time of the alleged commission of the offense and may present evidence at trial that he was not eighteen years of age or older at the time of the alleged commission of the offense. The burdens of raising the matter of age, and of going forward with the evidence relating to the matter of age, are upon the defendant. After a defendant has raised the matter of age at trial, the prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the defendant was eighteen years of age or older at the time of the alleged commission of the offense.

HISTORY: 129 v 5 1. Eff 10-19-81.

[§ 2929.02.4] § 2929.024 [Investigation services and experts for indigent.]

If the court determines that the defendant is indigent and that investigation services, experts, or other services are reasonably necessary for the proper representation of a defendant charged with aggravated murder at trial or at the sentencing hearing, the court shall authorize the defendant's counsel to obtain the necessary services for the defendant, and shall order that payment of the fees and expenses for the necessary services be made in the same manner that payment for appointed counsel is made pursuant to Chapter 120. of the Revised Code. If the court determines that the necessary services had to be obtained prior to court authorization for payment of the fees and expenses for the necessary services, the court may, after the services have been obtained, authorize the defendant's counsel to obtain the necessary services and order that payment of the fees and expenses for the necessary services be made as provided in this section.

HISTORY: 129 v 5 1. Eff 10-19-81.

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury;

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(2) Life imprisonment with parole eligibility after

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

HISTORY: [illegible] (139 v S 1). Eff [illegible].

§ 2929.03 Crimes for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detention, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding, and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

(D)(1) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1, Eff 10-19-81.

§ 2929.05 [Appellate review of death sentence.]

(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

Any court of appeals that reviews a case in which the sentence of death is imposed shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

(B) The court of appeals and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed, and, except as otherwise provided in this section, shall conduct the review in accordance with the Appellate Rules.

(C) Whenever sentence of death is imposed pursuant to section 2929.022 [2929.02.2] or 2929.03 of the Revised Code, the court of common pleas that sentenced the offender shall, upon motion of the offender and after conducting a hearing on the motion, vacate the sentence if all of the following apply:

(1) The offender alleges in the motion and presents evidence at the hearing that he was not eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced;

(2) The offender did not present evidence at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code that he was not eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced;

(3) The motion was filed at any time after the sentence was imposed in the case and prior to execution of the sentence;

(4) At the hearing conducted on the motion, the prosecution does not prove beyond a reasonable doubt that the offender was eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced.

HISTORY: 139 v S 1. Eff 10-19-81.

Cuyahoga County Common Pleas

THE STATE OF OHIO vs. LEWIS WILLIAMS, JR.	A TRUE BILL — AGGRAVATED MURDER R.C. 2903.01 WITH SPECIFICATIONS
DATE OF OFFENSE: January 20, 1983	THE TERM OF: JANUARY OF 1983
CASE NO.: Cr179814	

The State of Ohio, CUYAHOGA COUNTY } ss.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely caused the death of another, to-wit: Leona Chmielewski, while committing or attempting to commit or while fleeing immediately after committing or attempting to commit Aggravated Robbery,

SPECIFICATION 1:

The Grand Jurors further find and specify that the offense presented above was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Robbery and either the offender was the principal offender in the commission of the Aggravated Murder, or, if not the principal offender, committed the Aggravated Murder with prior calculation and design.

SPECIFICATION 2:

The Grand Jurors further find and specify that the offender, Lewis Williams, Jr., had a firearm on or about his person or under his control while committing the offense charged in this count of the indictment,

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Foreman of the Grand Jury — Prosecuting Attorney

INDICTMENT - ORIGINAL

OPPOSITION

BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

NO. 86-5307

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

LEWIS WILLIAMS,

Petitioner

vs.

STATE OF OHIO

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN T. CORRIGAN, Prosecuting Attorney
of Cuyahoga County, Ohio

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COUNTER QUESTIONS OF LAW

Respondent submits that the questions presented by the record in this case are more properly stated as follows:

1. Whether the Ohio statutory death penalty scheme, which permits the jury to consider as an aggravating circumstance that the offender committed an aggravated murder while committing the crime of aggravated robbery fails in its required duty to narrow the class of persons eligible for the death penalty and violates the Eighth and Fourteenth Amendments of the United States Constitution.

2. Whether a jury instruction in the penalty phase of a capital prosecution to exclude consideration of bias, sympathy, or prejudice which is intended to insure that the sentencing decision is based upon statutory guidelines denies a criminal defendant due process of law.

3. Whether a sentencing instruction informing a jury that a death recommendation is not binding and that a life verdict is binding unfairly biases a jury in favor of returning a death penalty verdict.

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NO. 86-1307

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

LEWIS WILLIAMS

Petitioner

vs.

STATE OF OHIO

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio.

The Court of Appeals, Eighth Judicial District, affirmed the convictions. Likewise, the Supreme Court of Ohio affirmed the convictions. See, State v. Lewis Williams, 23 Ohio St. 3d 16 (1986).

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable

decisions of this Court. No substantial federal question is presented by the Petitioner for Certiorari.

STATEMENT OF THE CASE

On February 1, 1983, after a month long rampage of crime, petitioner was charged in a five count indictment with the robbery of Dorothy Williams on December 20, 1982, Ohio Revised Code, Section 2911.02; with an aggravated burglary, Ohio Revised Code, Section 2911.11; and theft, Ohio Revised Code, Section 2913.02, against Neil Arsham on January 11, 1983, and with aggravated murder with specifications, Ohio Revised Code, Section 2903.01; with aggravated robbery, Ohio Revised Code, Section 2911.01, against Leona Chmielewski on January 20, 1983. These final two counts of the indictment were tried separately from the first three counts, and are the subject of the present petition.

On September 18, 1983, a jury trial was commenced in the courtroom of the Honorable James D. Sweeney. The petitioner was found guilty of aggravated murder and aggravated robbery and all specifications on October 7, 1983.

Pursuant to law, a sentencing hearing was held on October 13, 1983 before the trial jury. After hearing evidence in mitigation of the petitioner's guilt, the jury determined that the aggravating circumstance present in the case outweighed any mitigating factors, and accordingly recommended the sentence of death.

On November 3, 1983, the trial court accepted the jury's recommendation and sentenced the petitioner to death for the aggravated murder of Leona Chmielewski. On the charge of aggravated robbery, the petitioner was sentenced to a term of imprisonment for seven to twenty-five years. The petitioner was also sentenced to a three year term of actual incarceration on the firearm specification, pursuant to Ohio Revised Code, Section 2929.71. From that result, the petitioner appealed to the Eighth District Court of Appeals, which upon de novo review affirmed the conviction and sentence on October 25, 1984.

On March 26, 1986, the Ohio Supreme Court affirmed the Court of Appeals judgment in all respects.

STATEMENT OF THE FACTS

In proving this petitioner's guilt beyond any reasonable doubt, the State of Ohio presented testimony from twenty-one witnesses as well as forty-seven pieces of physical evidence.

The State's first witness was Kevin Samuels, the defendant's cousin and one of the people who saw the defendant with his victim, Mrs. Leoma Chmielewski in the last few moments of her life. Samuels testified that on January 20, 1983 he was living across the street from Mrs. Chmielewski. During the evening hours on that date, Samuels had several visitors, among them the petitioner, Brent Nicholson (aka Brent Byrd), Tyrone Robinson, Louis Samuels and the petitioner's brother, Mark Williams. Kevin Samuels testified that the petitioner and Tyrone Robinson had left the Samuels home shortly after 8:00 p.m. to purchase some beer. Robinson returned alone about one half hour later, indicating that the petitioner was still at the store (R. 1281-1282). Mark Williams showed up at that time, looking for the petitioner, eventually finding him across the street at the home of Leoma Chmielewski. Samuels testified that the petitioner repeatedly refused to leave Mrs. Chmielewski's home when asked by Samuels to do so (R. 1291).

The attempts to get the petitioner to return to Samuel's house ended between 10:00 and 10:30 p.m., when Nicholson prepared to take Samuels for medical treatment at the V. A. Hospital. While pulling out of the driveway, Samuels looked across to Mrs. Chmielewski's house and saw the petitioner standing inside her front doorway with Mrs. Chmielewski. Samuels had Brent Nicholson blow the car horn to summon the petitioner a final time from Mrs. Chmielewski's house, but he petitioner stayed inside (R. 1290).

Kevin Samuels also testified that he and Brent Nicholson returned from the hospital at approximately 11:30 p.m., without Tyrone Robinson. Upon returning, they observed Mrs. Chmielewski's door standing open and once again Kevin told Brent to go and get the petitioner (R. 1294). Brent went to the doorway, where he saw Mrs. Chmielewski's body lying on her living room floor.

Samuels testified that he and Byrd returned to Samuels' house where they

telephoned the petitioner's home and the police (R. 1295). Samuels also identified several photos depicting Mrs. Chmielewski's home and the neighborhood in which the slaying occurred (R. 1296-1298).

Samuels also testified about a telephone conversation he had with the petitioner in which the petitioner got upset because "I had called the police on him" (R. 1298).

Samuels' account of the events of the evening of January 20, 1983 were corroborated in every relevant particular by several other State's witnesses.

Louis Samuels took the stand next and testified that he was also present at Kevin Samuels' house for a short time on January 20, 1983. He testified that he arrived there with Mark Williams, the petitioner's brother. Mark Williams was looking for the petitioner to get some money that "he claimed his brother had took" (R. 1319). They left shortly thereafter.

The State's next witness was Brent W. Nicholson, also known as Brent Byrd. He also corroborated Kevin Samuels' account of the events of January 20, 1983. He described the petitioner's exit to go to the store, and his failure to return. He described Mark Williams' arrival, looking for his brother, and his departure shortly after, speaking to the petitioner in Mrs. Chmielewski's house (R. 1336-1338). He described the several failed attempts by Kevin Samuels to get the petitioner to return from Mrs. Chmielewski's house. Nicholson also told of seeing Mrs. Chmielewski at her front door as he left with Kevin Samuels for the V.A. Hospital (R. 1342-1343).

Nicholson also described finding the body of Leoma Chmielewski when they returned approximately one hour to ninety minutes later (R. 1345-1347). Nicholson described the location and position of the body, as well as various pieces of physical evidence later photographed and collected by the police (R. 1348-1351). Specifically, Nicholson stated that he saw loose change scattered near the body by the front door, and he identified a photo of the coins.

Other witnesses also testified to the events leading up to the petitioner being left alone with Mrs. Chmielewski in the last moments before her murder.

Tyrone Robinson testified that Mrs. Chmielewski had beckoned him and the petitioner over to her house as they were going to get beer, and that the petitioner stayed in her house all evening using the telephone. He also testified about a confrontation between Mark Williams and the petitioner over some money (R. 1464) and about Kevin Samuels' unavailing attempts to get the petitioner out of Mrs. Chmielewski's house. The petitioner's brother, Mark Williams, also took the stand. He testified that he had had a dispute with the petitioner over a sum of money in Mrs. Chmielewski's home on the night of her murder (R. 1645-1647).

Several of Mrs. Chmielewski's neighbors also testified for the State of Ohio. They were Stephen Crimm, Katie James and Samuel Benko. Each testified that he heard a loud bang, like a door slamming, sometime between 10:00 p.m. and 11:00 p.m. on January 20, 1983 (R. 1419, 1436-1437, 1527).

Dr. Robert Challener of the Cuyahoga County Coroner's Office testified that he had performed an autopsy upon the body of Leoma Chmielewski on January 21, 1983. His conclusions were as follows: Mrs. Chmielewski had suffered multiple blunt force injuries of the head and neck, as well as a single gunshot wound. The bullet had entered through her upper lip, perforated her tongue and spinal cord and lodged in the back of her neck. According to Dr. Challener's expertise, the gunshot was fired from a distance of two feet or less form the victim's face (R. 3171) and was the cause of Mrs. Chmielewski's death. The death was officially ruled by him a homicide (R. 1373-1374).

Other members of the Cuyahoga County Coroner's Office also testified. Mary Cowan testified as an expert in trace evidence. She stated that she had examined the clothing that Mrs. Chmielewski had been wearing at the time of her death, and had discovered an imprint on the hem of her nightgown. This imprint, consisting of several parallel lines, was compared with the characteristics of the shoes which the defendant had been wearing at the time of his arrest. This comparison revealed a "physical match" between the imprint and the medial aspect of the defendant's left shoe (R. 1603).

Also, from the Coroner's Office was Sharon Rosenberg, who testified

regarding gunshot residue tests performed upon a jacket belonging to the petitioner. Miss Rosenberg stated that her investigation revealed a discrete particle of lead on the cuff of the defendant's left sleeve. This particle was, in Miss Rosenberg's opinion, consistent with gunshot residue (R. 1630).

Also testifying for the State were Jack Swiger and Gertrude Swiger, the son and daughter-in-law of Leoma Chmielewski. Mrs. Swiger stated that Mrs. Chmielewski had an account at National City Bank and that Mrs. Swiger often took her shopping and banking (R. 1538). Both Jack and Gertrude Swiger testified that they inventoried Mrs. Chmielewski's property in settling her estate, but that her billfold or wallet was never found after her murder.

Another witness presented by the State was Patrolman James McCreary. He testified that he was the first police officer on the scene after Mrs. Chmielewski's death. He described his investigation of the incident, particularly a number of National City Bank envelopes which he found inside Mrs. Chmielewski's house and in a pattern on the ground outside leading northward away from the front door (R. 1410). Patrolman McCreary also testified that he discovered an open purse in a bedroom closet with its contents spilled out on a shelf (R. 1412-1413).

Detective Willie Love also testified to part of the initial investigation at Mrs. Chmielewski's house in the early morning hours of January 21, 1983. Specifically he testified that he attmepted to take fingerprints from Mrs. Chmielewski's telephone which was found off the hook. He stated that no latent prints were found because the telephone appeared to have been recently wiped off to obliterate any prints (R. 1521).

Detective Timothy Patton testified concerning the taking of crime scene photos and the collection of physical evidence. He also related conversations between himself and the petitioner after the petitioner's arrest, during which the petitioner made several contradictory statements as to his activities on the night of Mrs. Chmielewski's murder (R. 1500-1505).

Detective James Svekric, Detective James Cudo and Detective Donald Ferris also testified in the State's case. Detective Svekric testified to the petitioner's arrest on Janaury 22, 1983 and to remarks made to him by the petitioner. Detective Svekric stated that the petitioner admitted being in

Mrs. Chmielewski's house on the night of her murder, but denied killing her (R. 1639).

Detective Cudo testified to transporting the petitioner's clothing to the Coroner's Office for testing after his arrest and to the police search for the missing wallet in the area around Mrs. Chmielewski's home (R. 1568, 1570).

Detective Ferris testified to his initial crime scene investigation and specifically that there were no signs of forced entry in Mrs. Chmielewski's house (R. 1659).

The State's final two witnesses were former cellmates of the petitioner while he was locked up in the Cuyahoga County Jail pending trial. Both Michael Anderson and Navarro Brooks testified that the petitioner had told them that he murdered Leona Chmielewski on January 20, 1983. Anderson testified that the petitioner told him that he had killed a lady up on Buckeye: "He just kept telling her to shut up, and she wouldn't shut up. And he stuck the gun in her mouth and shot her" (R. 1673).

Navarro Brooks stated that during a conversation with the petitioner in jail, the petitioner slouched in his chair and said, "Now, to tell you the truth, I blew the bitch away" (R. 708). On another occasion, with respect to Kevin Samuels and Brent Nicholson, the petitioner told Brooks, "Man, they should have left the body there and kept on going. They didn't have to call no police" (R. 717). He also told Brooks that Mrs. Chmielewski was lying face down by the front door after she was shot, and that he rolled the body over with his foot (R. 1717-1720).

After Anderson's and Brooks' testimony about the petitioner's confessions, the State rested. The petitioner then rested without presenting any evidence or taking the stand in his own defense.

REASONS FOR DENYING THE WRIT

1. Ohio's statutory framework for the imposition of capital punishment does not violate the Eighth and Fourteenth Amendments to the United States Constitution.

Petitioner argues that aggravating factors for felony murders simply duplicate an element of the offense while a murder by prior calculation and

design requires proof of a separate aggravating circumstance in order to justify a death sentence. As such petitioner argues that a single act should not both convict and aggravate.

A review of this Court's decision in Jurek v. Texas, 428 U.S. 262 (1976), demonstrates that this contention is without merit.

The Texas statute under consideration in Jurek did not set forth a category of statutory aggravating circumstances which, if proven, would justify the imposition of the death penalty. Instead, the Texas system set forth five classes of murders the existence of any one of which would justify the imposition of a death sentence. This Court took notice of the fact that the five classes of murder set forth in the Texas statute encompassed the separate aggravating circumstances set forth in the Georgia and Florida statutes under consideration in Gregg v. Proffitt.

In sustaining the Texas statute, wherein the conduct which convicts also aggravates, this Court stated:

> *** So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two states is that the death penalty is an available sentencing option - even potentially - for a smaller class of murders in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime. Jurek, supra at 271.

Applying Jurek to the arguments raised by petitioner in the present case demonstrates that even if one were to construe the aggravated conduct of felony murder set forth within Revised Code, Section 2903.01 (B) as functionally equivalent to the aggravating circumstance under R.C. 2929.04 (A)(7), no constitutional infirmities would arise. On the contrary, any duplication is the result of the General Assembly having set forth in detail when a murder in the course of felony rise to the level of a capital offense, thus, in effect, narrowing the class of homicides in Ohio for which the death penalty becomes available as a sentencing option. See, State v. Jenkins, 15 Ohio St. 3d 164, 177 (1984), cert. denied, _____U.S._____, 106 S. Ct. 4546 (1985).

Petitioner cites Zant v. Stephens, 462 U.S. 862 (1983) for the proposition that the State may not make aggravated robbery and aggravating circumstance of

OPINION

SUPREME COURT OF THE UNITED STATES

86–5307 LEWIS WILLIAMS
v.
OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

86–6015 DANNY JOE BRADLEY
v.
ALABAMA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Nos. 86–5307 AND 86–6015. Decided March 9, 1987

The petitions for writs of certiorari are denied.

JUSTICE BRENNAN, dissenting from the denial of certiorari in both cases.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentences in these cases.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting from the denial of certiorari in No. 86–5307.

In this case, the Ohio Supreme Court rejected petitioner's claim that a statutory aggravating factor that repeats an element of the crime is unconstitutional because it fails to narrow the class of persons eligible for the death penalty. This decision is consistent with *Wingo* v. *Blackburn*, 783 F. 2d 1046, 1051 (CA5 1986), cert. pending, No. 86–5026, but in conflict with *Collins* v. *Lockhart*, 754 F. 2d 258, 263–264 (CA8), cert. denied, —— U. S. —— (1985). I would grant certiorari to resolve this conflict.

JUSTICE MARSHALL, dissenting from denial of certiorari in both cases.

In these cases, petitioners' death sentences were founded on statutory aggravating factors that repeat elements of the underlying capital offenses. For reasons stated in *Wiley* v. *Mississippi*, —— U. S. —— (1986) (MARSHALL, J., dissenting from denial of certiorari), I would grant the petitions for review.

aggravated murder. This case is entirely inapposite. Zant simply allued to Godfrey v. Georgia, 446 U.S. 420 (1980) in which this Court struck down a vague statutory aggravating circumstance which failed to create any inherent restraint on the arbitrary and capricious infliction of the death sentence, because a person of ordinary sensibility could find that almost every murder fit the stated criteria. Zant at _____, 103 S. Ct. at 2743, quoting Godfrey at 428-429.

Consequently, there is no merit to petitioner's argument.

2. The instruction to the jury in the penalty phase of a capital prosecution to exclude consideration of bias, sympathy or prejudice is intended to insure that the sentencing decision is based upon a consideration of the reviewable guidelines fixed by statute as opposed to the individual juror's personal biases or sympathies.

The instruction to the jury in the penalty phase of a capital prosecution to exclude consideration of bias, sympathy or prejudice is intended to insure that the sentencing decision is based upon a consideration of the reviewable guidelines fixed by statute as opposed to the individual juror's personal biases or sympathies. The instruction adequately conveys this purpose by using the term "sympathy" together with the terms "bias" and "prejudice." When read in conjunction with a correct instruction as to mitigation, as was the case here, the jury is directed to focus on the guidelines set forth by statute.

This direction is necessary and entirely consistent with the view expressed by this Court in Barclay v. Florida,463 U.S. 939 (1983), that, "[t]he thrust of our decisions on capital punishment has been 'that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' Zant v. Stephens, ____U.S. _____, *** 77 L. Ed. 2d 235 *** (1983), quoting Gregg v. Gerogia, 428 U.S. 153, 189 *** (1976) (opinion of Stewart, Powell, and Stevens, JJ.)." See, State v. Jenkins, at 192.

3. A sentencing instruction informing a jury that a death recommendation is not binding and that a life verdict is binding does not unfairly bias a jury in favor of returning a death penalty verdict.

The United States Supreme Court has addressed a similar issue in California v. Ramos, _____ U.S. _____, 77 L. Ed. 2d 1171 (1983), where this Court held that a State is constitutionally entitled to permit juror consideration of the governor's power to commute a life sentence.

Further, the Ohio Supreme Court found upon examination of the entire record that the jury instruction at issue did not result in prejudice to the defendant. See, Jenkins, supra, pgs. 200-203.

Petitioner nevertheless challenges these jury instructions on authority of Caldwell v. Mississippi, (1985), 472 U.S. _____, 86 L. Ed. 2d 231. This Court vacated a death sentence upon finding that a prosecutor's closing argument, urging the jury not to view itself as finally determining whether petitioner would die because a death sentence would be reviewed for correctness by the state supreme court, was inaccurate and misleading. The plurality of the court found that this diminished the jury's sense of responsiblity which is indispensable to the Eighth Amendment's "'need for reliablity in the determination that death is the appropriate punishment in a specific case.'" Id. at 236, quoting Woodson v. North Carolina, (1976), 428 U.S. 280, 305.

The Caldwell court felt that the state improperly created the impression that the appellate court would be free to revese the death sentence if it disagreed with the jury's conclusion that death was appropriate. Id. at 246-247, fn. 7. Justice O'Connor noted that the case distinguished by the plurality, California v. Ramos, (1983), 463 U.S. 992, does not "suggest that the Federal Constitution prohibits the giving of accurate instructions regarding post-sentencing procedures." Caldwell, supra, at 248 (O'Connor, J., concurring). That is all that happened here; the judge told the jury that its death penalty recommendation is "just that - a recommendation, and is not binding upon the Court *** [but that a life sentence] is binding upon the court and the judge must impose the specific life sentence which you have recommended." Under Revised Code, Section 2929.03 (D)(2) and (3), the jury and the trial court each make an independent

finding as to whether the aggravating circumstances outweigh the mitigating factors, thus justifying the death sentence. No Ohio court is bound by the jury's weighing of the mitigating circumstances, as opposed to the Mississippi scheme reviewed by the Caldwell court. In Mississippi the jury's verdict of death would not be overturned unless "it 'was against the overwhelming weight of the evidence,' or if the evidence of statutory aggravating circumstances is so lacking that a 'judge should have entered a judgment of acquittal notwithstanding the verdict.'" Id. at 248, quoting Williams v. State, (Miss., 1984) 445 So. 2d 798, 811. The jury instructions in the instant case were an accurate statement of the law and, therefore, were relevant to the valid state interest in educating the jury on the applicable law. State v. Williams, 23 Ohio St. 3d 16, 22 (1986).

CONCLUSION

In conclusion, the respondent, State of Ohio, submits that the petition herein fails to present any question of constitutional dimension justifying review by the Court. Every issue raised in petitioner's brief has been previously reviewed by this Court in State v. Jenkins, 15 Ohio St. 3d 164 (1984), cert. denied, _____ U.S. _____, 106 S. Ct. 4546 (1985). The petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN T. CORRIGAN, Prosecuting Attorney
of Cuyahoga County, Ohio

BY: George J. Sadd
George J. Sadd
Assistant Prosecuting Attorney
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1200 Ontario Street
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SERVICE

A copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been mailed this 10th day of September, 1986, to Robert M. Ingersoll, Attorney for Petitioner, The Marion Building #307, 1276 West Third Street, Cleveland, Ohio 44113.

George J. Sadd
Assistant Prosecuting Attorney

NO. 86-5307

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

LEWIS WILLIAMS,

Petitioner

vs.

STATE OF OHIO

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OHIO

AFFIDAVIT OF FILING

I, JOHN T. CORRIGAN, being first duly cautioned and sworn, depose and say that I am a member of the bar of this Court and otherwise competent to executethis affidavit, pursuant to Rule 28.2, Rules of the United States Supreme Court. On the tenth day of September, 1986, I caused to be sent by first class, prepaid United States mail, to the Clerk of Court, United States Supreme Court, 1 First Street, Washington, D.C. 20543, one copy of the Brief in Opposition to Petition for a Writ of Certiorari to the United States Supreme Court in the above captioned matter. Such mailing was made within the time permitted by this Court for such a filing.

JOHN T. CORRIGAN
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7730

Sworn to before me and subscribed in my presence this 10th day of September, 1986.

PATRICIA A. COSTELLO, Notary Public
For the State of Ohio, Cuyahoga County
My Commission Expires June 13, 1987

Patricia A. Costello
Notary Public